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Supreme Court of the United States

OCTOBER TERM 1948

No. 187

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WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE
and EARL W. HITCH

Petitioners

v.

METROPOLITAN LIFE INSURANCE COMPANY

Respondent

◆

Petition for Writ of Certiorari
to the Supreme Court of New York County
State of New York

HAYDEN C. COVINGTON
GROVER C. POWELL

Counsel for Petitioners

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Petition for Writ of Certiorari to the Supreme Court of New York County State of New York

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Watchtower Bible and Tract Society, Inc., George W. Kelly, Maurice L. Hare and Earl W. Hitch, present this petition for writ of certiorari to the Supreme Court of New York County, State of New York, to review a judgment on the remittitur and opinion of the New York Court of Appeals affirming judgments against your petitioners, and show unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The decisions below flout this Court's decisions in *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); and *Tucker* v. *Texas*, 326 U. S. 517 (1946), justifying reversal simultaneously with granting the writ of certiorari. See pages 28, 29, 45-46 *infra*.

2. *Opinions of the Courts Below.*

The opinion of the trial court in this case is reported at 188 Misc. 978, 69 N. Y. S. 2d 385. It appears in the record. [988-1001][1] The Appellate Division of the New York Supreme Court affirmed without an opinion. The decision is reported at 272 App. Div. 1039, 75 N. Y. S. 2d 81. [1013, 1015-1016] The opinion of the New York Court of Appeals is reported at 297 N. Y. 572. It also appears in the record. [1023-1029]

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

4. *Timeliness of the Petition.*

The judgment of the New York Court of Appeals was rendered April 22, 1948. [1023, 1030] The remittitur of the New York Court of Appeals was issued on April 23, 1948. [1031] The order of affirmance was entered May 8, 1948. [1035] The judgment of affirmance was entered May 19, 1948. [1033] An order was made by the Circuit Justice ex-

[1] Numbers appearing herein in brackets refer to pages in the printed record in this case.

tending time for filing this petition to August 14, 1948. [1036] The petition for writ of certiorari is filed within the time fixed by the order of the Circuit Justice.

5. *State Law Involved.*

Although no New York statute is directly challenged in this case the constitutionality and validity of state action through judicial enforcement, by the courts below, of the regulation of respondent, construed and applied to petitioners, are here drawn in question.

6. *Constitutional Provisions Involved.*

The First and Fourteenth Amendments to the United States Constitution protecting fundamental freedoms are relied upon.

7. *Federal Statutes Involved.*

The Federal Civil Rights Act, also protecting freedoms of press and of worship, is relied upon.

8. *Court Approved Regulation Complained Of.*

The Parkchester regulation promulgated by respondent and enforced by the courts below, which is drawn in question, reads as follows:

"No person or group of persons shall enter any apartment building in the Parkchester development for the purpose of convassing or of vending, peddling, or soliciting orders for any merchandise, device, book, periodical, pamphlet, circular, or for any printed, mimeographed, multigraphed or typewritten matter whatsoever; nor for the purpose of soliciting alms, donations, or a subscription or a contribution to any church, religious, charitable, or public

institution or organization whatsoever; nor for the purpose of distributing any handbill, pamphlet, circular, tract, book, booklet, notice, or advertising matter; nor for the purpose of playing any phonograph or musical instruments in said apartment houses in connection with such canvassing, vending, peddling, solicitation or distribution; provided, however, that such canvassing, vending, peddling, soliciting or distribution may be made with the consent of the Manager of the development or may be made within the apartment of any tenant if the prior written consent or invitation of such tenant shall have previously been furnished or exhibited to the Manager of the development." [19-20, 990-991]

9. *Questions Presented.*

Main Questions

ONE

Did judicial enforcement of the respondent's regulation by the courts below abridge the right of Jehovah's witnesses and petitioners to freedom of press and of worship of ALMIGHTY GOD contrary to the First and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act?

TWO

Does the regulation of the respondent, as construed, applied and enforced by respondent and the courts below, abridge the rights of Jehovah's witnesses and petitioners

to freedom of press and of worship of ALMIGHTY GOD contrary to the First and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act?

THREE

Was the regulation discriminatorily construed, applied and enforced by the respondent and the courts below so as to abridge the rights of Jehovah's witnesses and petitioners contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution and the Federal Civil Rights Act?

Subsidiary Questions

ONE

Did respondent's taking of the law into its own hands in its enforcement of the regulation by falsely arresting Jehovah's witnesses and petitioners, evicting them from the buildings, deporting them from the community, and its subsequent request for court approval of such action entitle petitioners to invoke the First and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act, notwithstanding the regulation was no municipal ordinance?

TWO

Did the trial court abridge the constitutional rights of Jehovah's witnesses and the petitioners contrary to the First and Fourteenth Amendments to the United States Constitution by receiving into evidence and considering the hearsay poll of the inhabitants of Parkchester?

10. *How Federal Questions Raised and Disposed of Below.*

In a complaint filed in the New York Supreme Court, sitting in New York County, the petitioners asked the court "to vindicate and to declare that plaintiffs' activity has been wrongfully interfered with by defendant contrary to the Civil Rights Act of the United States, the Constitution of New York and the Constitution of the United States." [10-11] Petitioners alleged that they were engaged in preaching the gospel by means of distribution of literature and by word of mouth from door to door within the respondent's apartment community. [11-15] It is alleged that, because petitioners refused to discontinue such practice, the respondent, to enforce the regulation, took the law into its own hands and forcibly evicted petitioners from the halls of the apartment buildings where they were calling from door to door and deported them from the community. [15-16] Threats to continue such eviction and deportation by self help and taking the law into its own hands was alleged. [16-17, 20-21, 23]

Petitioners alleged that they were, by reason of such conduct by respondent, deprived of their right to have the issue adjudicated through criminal proceedings brought against them under the trespass statutes of New York and that they were forced and compelled to bring this action to have the regulation and the unlawful conduct of respondent declared to be an abridgment of the civil rights of petitioners. [25]

It was alleged that the regulation had been arbitrarily, capriciously and discriminatorily enforced against petitioners. [22] It was further alleged that the regulation, as construed, applied and enforced against petitioners, abridged their rights of freedom of press and of worship contrary to the First and Fourteenth Amendments to the United States Constitution. [22, 23, 25, 26-27]

All material allegations in the complaint were denied

by respondent. [29-36] By trial amendment, duly allowed by the court, respondent sought affirmative relief against petitioners and requested the court to enter a declaratory judgment against petitioners holding that they had no constitutional right to call from door to door in the apartment buildings; that the policy, practice and regulation of respondent, as enforced and applied against petitioners, were valid; that petitioners were guilty of trespassing against respondent in entering the apartment buildings without the consent of respondent; and that respondent had the legal right to forcibly remove and eject petitioners from said apartment buildings. [53, 756]

When petitioners rested their case, respondent moved to dismiss the complaint upon the grounds stated in the amendment. [756-758] In answer thereto, petitioners asserted that they had established a prima facie case for each and every one of the reasons alleged in the complaint and which grounds are stated above. [759-763] The court denied respondent's motion. [763]

At the close of all the testimony, the respondent renewed its motion stating explicitly all of the grounds asserted in the amendment. [896-898] The petitioners moved for a judgment for each and every one of the grounds stated in the complaint and explicitly set forth above. [898-899]

The motions were argued by counsel and the case, being fully briefed, was taken under advisement and decision reserved. [906] The trial court sustained the motion of respondent and overruled the motion of petitioners, holding that there was no deprivation of a constitutional right by state government power and that the abridgment by the private regulation of respondent was not within the grasp of the Fourteenth Amendment. [966-997] However, fearing its conclusion may be wrong that the Fourteenth Amendment did not reach petitioners, the trial court concluded

(assuming that the rights of the parties were to be tested by principles laid down in the decisions by this Court in reference to municipal ordinances and state statutes), nevertheless, that the regulation, as construed and applied to petitioners was valid even if it were considered to be a municipal ordinance or a state statute. For that reason the trial court held that the civil rights of petitioners were not violated. The trial court held that the law permitted municipal regulation of door-to-door activities upon private property so as to require a permit from the manager of the community or have prior written invitation of the householder, to be first filed with the manager, as a condition precedent to calling upon any resident in the community. [997-1001]

Upon appeal to the Appellate Division the judgment of the trial court was unanimously affirmed without opinion. [4, 1012-1013, 1015-1016]

An appeal was duly taken to the New York Court of Appeals. [1011-1012] The Court of Appeals refused to decide whether the Fourteenth Amendment proscribed private regulations made by dwelling proprietors governing conduct inside multiple dwellings. [1029] The Court of Appeals treated the regulation, as construed and applied by the respondent and the inferior New York courts, as though it were a municipal ordinance. [1026-1028] The Court of Appeals concluded that the construction of the United States Constitution was directly involved. [1025] The remittitur recites that a "question under the Federal Constitution was presented and necessarily passed upon". [1030] In determining the validity of the regulations, the Court of Appeals applied the principles requisite for determining the validity of a municipal ordinance or a state statute. [1026-1028] It held that the house-to-house calling by distributors of literature from door to door within a community, being upon private property, may be regulated by municipal ordinances requiring a permit or prior ex-

press invitation of the householder in the community as a condition precedent to the distribution of literature. [1028-1029]

11. *Nature and History of Action.*

This civil action was instituted by serving and filing a summons and complaint upon respondent. [6-28] The action was for a declaratory judgment and for injunction to redress the deprivation of the civil rights of petitioners within the privately-owned community of Parkchester in New York City. [26-27]

Respondent's answer, denying all the material allegations [29-52], was amended upon the trial. [53, 756] Respondent asserted that its enforcement of the regulation was valid and that petitioners' constitutional rights had not been abridged by the eviction from the multiple dwellings and deportation from the community. [29-52] The issue was joined before Mr. Justice Pecora in Special Term, Part V and trial began on May 15, 1946. [2, 59] The trial of the action ended on May 31, 1946. [2, 59-907]

At the close of petitioners' case, respondent made a motion to dismiss. [756-758] The motion was denied. [763] At the close of all the evidence both sides rested and respondent renewed its motion and petitioners moved for judgment awarding the relief prayed for in the complaint. [896-899] The cause was orally argued by counsel on May 28 and May 31, 1946, when it was submitted and decision reserved. [903-907]

Almost a year later, the court rendered its decision holding the regulation valid as enforced against the petitioners and for that reason ordered the complaint dismissed. [2-3, 988-1001]

On April 14, 1948, a judgment was entered dismissing the complaint. [54-57] The case was duly appealed to the Appellate Division of the New York Supreme Court. [3,

10-11, 58] The Appellate Division unanimously affirmed, without opinion. [1013, 1015-1016] Appeal was taken, as of right, to the New York Court of Appeals, because constitutional questions were involved, by the filing of a notice of appeal in the form and manner required by law. [1011]

The Court of Appeals affirmed by decision on April 22, 1948, and judgment of affirmance was entered on May 19, 1948. [1023-1029, 1932-1033]

12. *Summary of Facts.*

Respondent owns and operates Parkchester, an apartment community housing 12,000 families or over 35,000 persons, located in the Borough of The Bronx, New York City. [248-249, 256-257, 275, 956, 985][2] It is the largest housing project in the world, being composed of 171 apartment buildings ranging in height from seven to twelve stories. [257, 263, 264, 265-266, 267-268, 270, 956, 957-958, 959] These front on two public highways and several private streets that intersect the community, which is studded with parks and playgrounds. [263, 264, 265-266, 267-268, 270, 956, 957-958, 959]

On the ground floor and facing the streets in many of the buildings, are shops, stores, offices and gasoline filling stations. [257-258, 259-263, 267, 271-272, 764-765, 959-960] The usual municipal facilities of New York are used such as sewage disposal, fire protection and public library; and a federal post office is located in one of the buildings. [261-266, 764, 765, 766] Six hundred persons are employed to maintain this community. It has the appearance of any

[2] Respondent's project, Parkchester Community, to augment the slum-clearing efforts of the State of New York to provide good low-cost housing, was authorized by a special enactment of the Legislature of New York State. It is by virtue of this enactment that the Parkchester Community is operated by respondent. See Chapter 25 of the Laws of 1938 (p. 443). (Vol. 27, McKinney's Consolidated Laws. This act was amended in 1941, Chapter 577 of the Laws of 1941.) See also Chapter 808 of the Laws of 1939 (Vol. 44-A McKinney's Consolidated Laws, Annotated).

other community, town or city; it is described by the respondent as a "city within a city." [248, 271, 956]

The apartment buildings within which the door-to-door calling activity has been carried on in Parkchester are simple in design. [274] Each building has a double-door entrance, separated by a vestibule which leads to a public foyer, where there are located letter boxes and a directory of the tenants residing there. [274] There are no locks on the front doors at the entrances and no push buttons or buzzers or other communication system from the entrance to the apartments in each building. There are no doormen or guards located at the entrance. [274]

Each building has one or more self-operated push button elevators. [276] A narrow hallway is on each floor of the building. Each apartment opens onto such central hallway. On the door of each apartment is a two-tone chime switch, located below a peep hole, used for communication with occupants of the apartments. The buildings, foyers, elevators and halls are freely accessible to any caller desiring to enter. [276, 277]

All of the inhabitants of the community occupy the apartments under written leases made with the various 12,000 tenants, who are of the lower income bracket. [271, 324, 956, 960] The written lease obligates the tenants to obey all rules and regulations for the safety, care, and preservation of the buildings, as well as the regulations for good order, comfort, quiet, and convenience of all tenants. [36-51, 991-992] Since 1940 there has been a regulation that prohibited door-to-door calls by distributors of literature within the community unless permitted by the manager of the community, which regulation also prohibited such distributors from calling upon the tenants unless previously invited in writing to do so. The regulation required that the written invitation be tendered to the manager of the community before making such visit. This regulation, though unwritten at first, was put in writing later, finally

reaching, over the course of the years, the form shown in the record in this case. [277-278, 768-770] No concerted effort was made by respondent effectively to enforce the regulation by eviction of callers from the buildings or deportation from the community over the course of the years except as to Jehovah's witnesses. [281-282, 284-285, 286, 288, 354, 355, 358, 360, 364, 365, 366, 368-369, 370, 371, 387-388, 408-409, 435, 436, 768-770, 795, 797, 781-782, 802, 804-805, 810, 813, 818, 822, 826, 828, 834-835] Tacit and express approval has been allowed without a permit or without previous invitation by the tenants for certain types of solicitations and door-to-door calls since the inception of the regulation. [287, 290, 354, 358, 364, 368-369, 388, 435, 771, 794-795, 804-805, 813, 818, 828]

Following the opening of Parkchesteer in 1941, Jehovah's witnesses began their door-to-door missionary work by calling, without permission or prior invitation, upon the tenants. They distributed literature and talked with the people for the purpose of establishing Bible studies in the homes of the residents of the community, carrying on their work in a manner familiar to this Court. [66, 76-77, 78-79, 80, 81-83, 98-99, 100, 102, 103, 104-105, 106-107, 108-109, 117, 120-122, 123-124, 164, 165-166, 172, 173-174, 179, 180-181, 183-184, 185, 187, 343-344, 345, 347-348, 351, 362-363, 365, 380, 381-382, 440, 453, 528, 556, 557, 598, 618, 660-661, 672-673, 743-746, 747-749, 945-946, 952-953]

At first the evangelistic work was carried on by two female missionaries. [439, 452, 453] They were repeatedly interfered with and stopped, evicted from the buildings and deported from the community. [442, 443, 444, 449, 451, 453, 454-457, 459-460] This was done by the private police patrol maintained by respondents in Parkchester to guard the property and preserve order. [442, 443, 444, 449, 451, 453, 454-457, 459-460] This private safety patrol is under the protective division of the community of Parkchester, with

a staff fluctuating between 31 and 41 men who are on duty day and night. [281, 766-767]

The interference by the patrol caused a brief stoppage of the activities of Jehovah's witnesses which were resumed in 1943 within the community. The missionary field of Parkchester was then assigned to two men who devised a special technique for working in Parkchester so as to elude the pursuing guards. [474, 475, 476, 495, 497-498, 501, 502] These two men from time to time brought in other small groups of Jehovah's witnesses to assist them in preaching in the community. [475, 498-499, 504] This was made necessary by the constant and repeated interference by the safety patrol. [475, 476-477, 497] Notwithstanding the specially devised technique for Parkchester and the help of the groups, Jehovah's witnesses were continuously frustrated in their efforts to carry on the missionary work regularly in the community by the false arrests, evictions, and deportations from the community. [474-475, 476-477, 478, 497, 499, 771, 772]

From the beginning, Jehovah's witnesses experienced a satisfactory amount of interest on the part of the tenants in Parkchester, placed a large amount of literature, received contributions and called back upon the interested people. [441, 446, 448, 449, 450, 451, 457-458, 466-467, 469, 492, 503] Their method of approach to the people in the regular course of their preaching was courteous, kind and dignified. [446] They always immediately left each apartment door where the person answering the door was not interested. [475, 476, 497-498, 501, 502, 503] The director of the safety division followed Jehovah's witnesses on several occasions while they were engaged in their work and failed to find anything personally insulting or offensive to the tenants about their method of presenting their message. [771, 772]

The safety director informed Jehovah's witnesses in 1944 that the legal department of the community of Parkchester would get in touch with the legal department of the Watchtower Bible and Tract Society, Inc., the corporate legal governing body of Jehovah's witnesses in the United States. [105, 148, 340, 533, 717, 772-774, 908-910] Later the director personally apprehended Jehovah's witnesses and took them before the legal advisor for Parkchester who told them they had no right to work in the community. [774-775] As a result of these interviews a communication was made to the Watchtower Society resulting in a letter from counsel for Jehovah's witnesses and the Society to the legal department of Parkchester. [338, 934-942] Parkchester's legal department refused to exempt Jehovah's witnesses from the enforcement of the regulation and informed counsel that Jehovah's witnesses would be stopped from calling from door to door. [338, 943-944] From 1944 to 1946 the work of Jehovah's witnesses continued in the regular way, resulting in increased interference and almost complete frustration of their missionary activity by the illegal evictions and deportations. [575-581, 776, 777]

The director of the safety division again suggested to Jehovah's witnesses that the legal departments of petitioners and respondent get together and try to settle the controversy. [777] The respondent thereafter insisted on literal compliance with its regulation. The petitioners in response claimed they had a right to go from door to door in the community. Thereafter a mutual decision was reached that it would be best to clarify the controversy through court action. [333]

To bolster its questionable position and to support its discriminatory enforcement of the regulation against Jehovah's witnesses, the respondent conducted a poll of its tenants in the community on whether they desired Jehovah's witnesses to enter into their apartments, which plebiscite was taken with a view of using it upon the anticipated trial

of this action in the trial court. The canvass by mail vigorously importuned, if not tacitly coerced, the tenants to vote against Jehovah's witnesses. [299, 311, 979-981] A large number of the tenants did not reply to the solicitation and another forceful letter and card were mailed. [323, 328][3] The effect of this pressurized plebiscite (the tenants being under fear of refusal of the landlord to renew the lease and possible eviction in the face of the acute housing shortage) was that only 26 persons answered stating they wanted Jehovah's witnesses to come into their apartments. [322, 329-330, 981-982, 985] A scrutinous check of the poll upon the trial revealed numerous errors were committed by respondent in making its voting returns for the plebiscite. [327, 848-849]

When Jehovah's witnesses learned of the plebiscite, which continued in process after the action was instituted in the trial court, they planned to and did circulate a petition among a large portion of the tenants. [584-585] The petition was from the tenants and certified that those signing had no objection to Jehovah's witnesses calling from door to door. [584-585] Seventeen hundred and thirty-six tenants, out of seventy-four hundred and forty-six persons visited, signed the petition. [589, 593]

In order to do this operation it was necessary for an extraordinarily large number of Jehovah's witnesses to make a mass circulation of the petition in the community in one day. [584-585] On April 28, 1946, during the pendency of this action the petition (which was for the purpose of impeaching the illegal *ex parte* deposition taken by respondents without notice to petitioners) was circulated by over 700 of Jehovah's witnesses who entered all the apartment buildings in groups of four. [508, 586-589]

[3] Upon the trial this *ex parte* deposition, taken before trial and without notice, was objected to by the petitioners as immaterial, hearsay and a gross deprivation of their federally secured constitutional rights. [300-302, 304-307, 308, 311, 312-316, 317-318, 320, 321-322, 331]

As a joint result of the controversy having been stirred up by the respondent among the tenants through the taking of the *ex parte* deposition in the form of the poll and the mass circulation of the petition, a large number of complaints from the tenants went in to the protective division. [779-780] It was the result of these calls, during the heat of the controversy between respondent and petitioners, that some of the tenants complained, the number of 144 being relatively small under the circumstances. [779-780] In fact less than ten tenants appeared at the trial to testify concerning their objections to the calls made by Jehovah's witnesses upon them out of all of the thousands of tenants residing in the community. [799-800, 806, 807, 814, 829, 836] Equally as large a number appeared at the trial and testified that they had no objections to Jehovah's witnesses calling upon them at the doors of their apartments. [352, 357, 363, 366, 367, 386, 408, 434]

Specification of the Reasons Relied on for Allowance of the Writ

The holding of the courts below that the exercise of civil rights from door to door, whether at single dwellings along the streets, or in multiple dwellings or apartment buildings along the hallways, may be validly prohibited or validly censored because the doors are private property, not only is out of harmony with the decisions of this Court but flagrantly flouts the holdings of this Court in *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *New Jersey,* 308 U. S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Follett* v. *McCormick,* 321 U. S. 573 (1944); and *Tucker* v. *Texas,* 326 U. S. 517 (1946), where

the activity made the basis of each conviction was carried on from door to door and upon private property.

The decision of the courts below, having treated the regulation as though it were a municipal ordinance, holding that the requirement of a permit from the manager of the community as a condition precedent to distribution of literature from door to door in Parkchester is valid as a regulatory power is out of harmony with, conflicts with and flouts the decisions of this Court in *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); and *Tucker* v. *Texas*, 326 U. S. 517 (1946).

The courts below, treating the regulation as though it were a municipal ordinance, held that the prohibition of door-to-door calls in Parkchester by means of the requirement that a written invitation from all the tenants be exhibited to the manager of the community is valid as a regulatory power, which holding is out of harmony with, conflicts with and flouts the decisions of this Court in *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); and *Tucker* v. *Texas*, 326 U. S. 517 (1946).

Holding that no constitutional right of petitioners was abridged by the conclusion that petitioners were trespassers in going from door to door in the community and could be evicted from the buildings and deported from the community to prevent such activity, the courts below made a decision which is out of harmony with and conflicts with the decisions of this Court in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), and *Tucker* v. *Texas*, 326 U. S. 517 (1946). Compare *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793 (1945).

In the event the question of whether the Fourteenth Amendment reaches the petitioners in this case so as to afford them the protection of the First Amendment against the court approval of the respondent's enforcement of the regulation of petitioners' activity upon the private property of respondent in the circumstances is reached and considered in this case the petitioners say that the holding below departed from and is in conflict with the decisions of this Court in *Shelley* v. *Kraemer,* 68 S. Ct. 836, and *Hurd* v. *Hodge,* 68 S. Ct. 847, both of which were decided on May 3, 1948.

The decisions of the courts below have so far departed from the ordinary and usual course of judicial proceedings as to require a consideration thereof by this Court and a reversal of the court below so as to halt the same.

In event this Court fails to find that there is a conflict between the decisions of the courts below and the decisions of this Court, then petitioners say that the questions presented upon this petition are grave and important federal constitutional questions which have not been, but which should be, decided by this Court.

Discussion of the Reasons

It is proper to assume that, because the court of Appeals decided the case upon principles applicable to review the enforcement of state action through legislation, the Court will not reach the question of whether there has been an infringement through state action through court approval of the enforcement of the regulation. Therefore the petitioners first discuss the validity of the regulation as though it were municipal or state legislation.

Not Regulatory

The term "regulation", applied to the device promulgated and enforced by respondent, is a mere euphemism. It is not regulatory. It does not purport to regulate the time and manner of door-to-door calls in Parkchester. It specifically and expressly prohibits such calls. It provides for an exception. The exception subjects door-to-door callers to censorship. The regulation neither expressly nor impliedly purports to regulate as to time, place and manner. The device is not a regulation.

"The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Cantwell* v. *Connecticut*, 310 U. S. 296, 306 (1940).

To be regulatory the device must state the times, places and manner of door-to-door calls. This is the only right that a community has in reference to door-to-door calls by persons exercising their rights of freedom of speech, press and worship.

Provisions for a permit were brought under review in *Blue Island* v. *Kozul*, 379 Ill. 511, 51 N. E. 2d 515 (1942). The Supreme Court of Illinois there said: "It is contended by the city that this is a regulatory ordinance. . . . The ordinance is not regulatory. As applied to the facts in this case, the ordinance makes no provision regulating the manner of carrying on the business of peddlers in the city of Blue Island."

In *McAlester* v. *Grand Union Tea Company*, 186 Okla. 487, 98 P. 2d 824 (1940), the court said: "The ordinance now considered is not regulatory but preventative and prohibitive as against an act innocent in itself and without surrounding facts or circumstances that would constitute the act of a public nuisance." See also *State* v. *McMonies*, 75 Neb. 443, 106 N. W. 454, where it is said: "It is familiar law that the power given a municipality to 'regulate' does

not authorize it to suppress or prohibit a trade or business, as the very essence of regulation is the existence of something to be regulated."

Door-to-door calls are not allowed to exist under the Parkchester device, except through the censorship of the manager of the community, which is unconstitutional. The requirement of prior written consent of the tenant and exhibition of such written consent to the manager of the community destroys and prohibits entirely door-to-door calls. It is obvious that the device is not regulatory and that the term "regulation" is a misnomer.

Door-to-Door Calls on Private Property Protected by the Constitution

Disregarding the standing precedents of this Court, the Court of Appeals below blindly and summarily concluded that the Constitution does not protect door-to-door distribution of literature, even when done at single dwellings fronting on public streets, because the doors are private property. [1026-1028] The trial court did not go quite that far. It limited the rule of prohibition and censorship of door-to-door activity to apartment buildings, stating that the decisions of this Court upheld the right of Jehovah's witnesses to go from private house to private house "abutting" on the *streets*. [997]

Until the alien doctrine advocated by the respondent was accepted by the New York Court of Appeals, it had not been supposed that one engaged in the distribution of literature from door to door stood on a more precarious ground than did one engaged in street and public sidewalk distribution of the same literature. Indeed this Court has declared, so far as distribution of literature was concerned, that "the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." (*Schneider* v. *New Jersey*, 308 U. S. 147) The

Court sustained the right of Jehovah's witnesses to distribute literature from door to door against laws forbidding it aimed to protect the peace, quiet and convenience of the householders in the cases of *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Follett* v. *McCormick*, 321 U. S. 537 (1944); and *Tucker* v. *Texas*, 326 U. S. 517 (1946). The New York Court of Appeals failed to notice the alleged lack of protection extended by the Constitution to door-to-door distributors of literature by respondent, when it ruled in favor of Jehovah's witnesses in *People* v. *Barber*, 289 N. Y. 378 (1943).

It must be conceded by respondent that this Court has held that the Constitution does guarantee the right to carry on door-to-door distribution of literature. If that is so then does it not make the freedom meaningless to suggest that it cannot be exercised on privately-owned sidewalks and steps or at the doors of the people? How can one make door-to-door distribution without getting to the doors? How can one knock at the doors or ring doorbells or chimes without being at the doors? The mere asking of these questions suggests (subject to the liability for trespass against the individual householder) that the freedom carries with it the right to call at the doors of the homes of the people.

To induce the court below to reach this result, respondent took a number of decisions by this Court involving the distribution of literature upon the streets where the courts have held that the streets are a proper place to distribute literature (*Hague* v. *C. I. O.*, 307 U. S. 496; *Jamison* v. *Texas*, 318 U. S. 413 (1943); and *Marsh* v. *Alabama*, 326 U. S. 501 (1946)) and by disingenuous sleight of hand swept into this category the case of *Tucker* v. *Texas*, 326 U. S. 517 (1946), which involved the right to distribute

literature at the doors of the homes of the people on private property contrary to the commands of the landlord not to do so. If, as respondent and the Court of Appeals contend, the constitutional right to distribute literature does not guarantee the right to go from door to door, then this Court has too long been oblivious to the phantasm so quickly perceived by the respondent and the New York Court of Appeals.

Constitutional Protection of Door-to-Door Calls Covers Such Activity in Apartment Buildings

The trial court, with approval of the Court of Appeals, held, since the right to call from door to door at single dwellings did not carry with it the privilege of entering such private homes, that by force of the same reason it did not carry the right to enter apartment buildings without the consent of the landlord. [997-998]

The respondent, in the courts below, made the fantastic argument that the provisions of its lease expressly and impliedly reserve to the landlord absolute dominion over the hallways, stairways and entrances to the buildings. Respondent amended the lease by construction which is strained beyond the breaking point. There is absolutely nothing in the lease agreement that explicitly or implicitly retains dominion over the hallways and entrances to the buildings which give the landlord control and the right to regulate in respect to visitors of the tenants. The leases and regulations printed on the back of them relate only to the power to control the conduct of the tenants in reference to quietness so as to prevent disturbances to their neighbors. Nothing is said in the leases which intimates an intention of the landlord to control visitors in the manner done by the regulation in this case.

The respondent argues that the halls are strictly private. This is an extreme argument. While the halls are not

public in the sense that streets are public they are public insofar as the means of ingress and egress to the apartments is concerned. Indeed the printed regulations on the back of leases signed by the tenants describe the halls, stairways, elevators, and elevator vestibules as "public". Regulation No. 1 provides that the "public halls" shall not be used "for any other purpose than for ingress to and egress from the apartments." [49-51]

Inasmuch as the lease does not expressly or impliedly grant to the landlord an absolute control over visitors of the tenants using the hallways and calling at the tenants' doors, it cannot be contended that the regulation, questioned here, is a covenant in the lease as claimed by respondent.

The pit that respondent and the courts below have fallen into is the result of a snare. It is the specious argument that the halls of the apartments have not been thrown open to the "public" for meetings like the public streets and parks. This unfortunate analogy of respondent and the courts below is factitious. It is not necessary that the means of ingress and egress to a door be dedicated and opened up to the public generally to be available to one engaged in distributing literature under the guarantee of the Constitution. Indeed no private sidewalk that leads over the yard or lawn of any dwelling has been dedicated for public purposes. Yet it has never been argued that one making use of such private sidewalk or paths can be deprived of his constitutional right of going from door to door distributing literature purely because such places have not been opened up to the public. Since it is not necessary to have private sidewalks and paths dedicated to the public in order to make them available to carry on door-to-door work at single dwellings, it is not necessary to show that the hallways of apartment buildings have been dedicated to the public before using them for the same purposes.

This brings us down to the beginning of the aberration of respondent and the deflection of the courts below. A consideration of an appropriate analogy will demonstrate that the respondent and the courts below 'jumped the track and derailed the freedom train'. Suppose that instead of building 171 apartment buildings on the acreage the respondent erected 171 single dwellings. Assume that the grounds remain the same as they are now and that, except for the two public streets traversing the property, the streets are private as they are now. Also suppose that the community remains open as it is now, having, of course, its shopping centers to accommodate the dwellers. Also suppose that such single dwellings would be built with sidewalks over the lawns connecting the door of the dwelling to the sidewalk and street, which naturally they would have. Suppose that the same kind of lease with the same kind of provisions appeared in the lease between the tenants of the supposed 171 single dwellings as the respondent now has with the present 12,500 tenants. Also suppose that the respondent maintained the same policy for its management of the project of 171 single dwellings and had promulgated the same regulation in respect to door-to-door calls as it now has in force. Suppose Jehovah's witnesses attempted to work the community of 171 single dwellings as they have attempted to work the apartment community. Assume also that they encountered the same difficulty resulting in the same action and with the same proof adduced in this case.

In such a supposition could it be reasonably and successfully argued that the landlord, the respondent herein, by virtue of its proprietary interest could stop Jehovah's witnesses from calling from door to door? It seems quite obvious in such a circumstance that the landlord could not do it legally, because the rights of Jehovah's witnesses to call from door to door are guaranteed by the Constitution.

From time immemorial the knock at the door, when not used to breach the peace, has been a legitimate means of

summoning the inmates to the door for purposes of intercommunication. It should be observed that at Parkchester community each tenant has a chime switch instead of a knocker or bell at the door. This is an implied invitation.

In *Fogarty* v. *Bogart*, 59 App. Div. 114, 146, 69 N. Y. S. 47 (1901), the question was whether or not a person who rang a doorbell to make an inquiry but made the unfortunate mistake of ringing the doorbell at the wrong house was an invitee. The court said:

"A person ringing the doorbell of a house not wantonly or in mischief, but in good faith for civil inquiries, is neither a trespasser nor a mere licensee, but is in the position of one who is rightfully there on the implied assurance of ordinary safety which is furnished by the presence and the purpose of the bell. . . . The case is distinguishable from that of a technical trespasser or one on the premises by license or mere sufferance. . . . Doorbells are occasionally rung for the mere purpose of inquiring the way, or the residence of someone in the neighborhood, or in the business of vending wares. In all such cases the bell must be regarded, in the absence of limitation or warning, as an implied invitation."

Petitioners assert that reception of guests or visitors of tenants is strictly a private right belonging to each individual tenant in the building, and that unless surrendered by an express agreement such right cannot be overcome and superseded by the regulation of Parkchester community based on its property rights or fancied "control" of the premises. The tenants' right to receive guests in their respective apartments or at their doors is one that has always been accorded in this country and is a matter of common knowledge and practice.

A question very similar to that now posed to this Court was presented to and decided by the United States Circuit Court of Appeals for the Second Circuit, in *Woods* v. *Carol Management Corporation*, No. 278, October Term,

1947, decided June 16, 1948. In that case duly authorized inspectors of the Housing Expediter attempted to enter the apartment house under control of the Carol Management Corporation to interview the tenants to ascertain whether there had been violations of the Rent Regulations and the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947.[4] The landlord denied entry to the inspectors. An action for injunction was brought in the federal court to restrain the barring of the inspectors from using the hallways and visiting the tenants. The district court, like the courts below in this case, held that the inspectors had no right to enter the building and denied relief. The court of appeals reversed by unanimous decision. Among other things, the opinion of the court states:

"The violations of the Act relied upon by the plaintiff were the refusal to allow inspection and the withholding by the defendants of access to their tenants. The Expediter represented a public interest and had an authority to take necessary steps to prevent such violations. While his information about violations was derived from complaints of tenants, such complaint, when reasonably verified, might form the basis for various proceedings to enforce the Act, and we see no justification for inconveniencing both the Expediter and the tenants by requiring the former to make his investigations in the roundabout way of summoning the tenants to his office rather than in calling upon them at the apartment and directly ascertaining conditions there. Indeed, it is impossible to see what right the defendants had either to exclude their tenants from having callers or to debar the representatives of the Expediter who wished to talk with the tenants about the alleged grievances of the latter. These representatives sought to call on the tenants as to lawful business with which both the Expediter and the tenants were properly concerned. They were in no sense

[4] 50 U. S. C. App., §§ 901 (b), 925 (a), (c), and (e) and 50 U. S. C. App. §§ 1884 (a) and 1886 (b).

mere interlopers whom the landlords might exclude from the passageways in the apartment house."[5]

In *People* v. *Paul,* 117 N. Y. L. J. 882 (Sup. Ct. March 5, 1947), Mr. Justice Wenzel, sitting in Special Term, Part II, New York County, in dismissing a writ of habeas corpus, said: "The door to a man's house in a civilized community is more than a means in ingress and egress for him. It is a tacit invitation to those who have lawful business with him to stand before it and announce themselves by ringing his door bell. Though they be then upon his property they are not trespassers and do not become such until they overstay their welcome and ignore a request to leave. If they have business with someone other than the owner resident in the building, they have a right to request to be announced to such a person and to be told by such a person or his or her agent that such person does not wish to see them if that is the fact."

The question here presented is also answered by the decision of the Massachusetts Supreme Judicial Court in *Massachusetts* v. *Richardson,* 313 Mass. 632, 48 N. E. 2d 678 (1943). There two of Jehovah's witnesses were arrested under a state statute while engaged in calling on residents of an apartment building over the protests of the owner of the building. Ruling on this precise issue, the court said:

"Whether the defendants entered the common passageways of the buildings in question in violation of the statute depends upon the extent of the control of the landlord thereof, and that of the respective tenants. It is settled that, when a landlord lets property to be occupied by several

[5] See also Williams v. Lubbering, 73 N. J. L. 317, 63 A. 90 (1906); Goldstein v. Healy, 187 Cal. 206, 201 P. 462, 464 (1921); Williams v. Mayer, 4 S. 2d 71, 72 (1941); Montgomery v. Virginia, 99 Va. 833, 37 S. E. 841 (1901); Suggs v. Anderson, 12 Ga. 461 (1853); Konick v. Champneys, 108 Wash. 35, 183 P. 75, 77 (1919); Mitchell v. Georgia, 12 Ga. App. 557, 77 S. E. 889 (1913); English v. Thomas, 48 Okla. 247, 149 P. 906; Duff v. Eichler, 336 Mo. 1164, 82 S. W. 2d 881 (1935); Federal Waste Paper Corp. v. Garment Center Capitol, 268 App. Div. 230 (affirmed 294 N. Y. 714); and Thousand Island Park Ass'n v. Tucker, 173 N. Y. 203.

tenants, although he retains for certain purposes control of the common doorways, passageways, stairways and the like, he grants to his tenants a right of way in the nature of an easement, appurtenant to the premises let, through those places that afford access thereto. *Hart* v. *Cole*, 156 Mass. 475, 476. *Tremont Theatre Amusement Co.* v. *Bruno*, 225 Mass. 461, 463. *Melville Shoe Corp.* v. *Kozminsky*, 268 Mass. 172, 180. This is necessarily so since 'the grant of any thing carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it.' *Salisbury* v. *Andrews*, 19 Pick. 250, 255. It is also settled that this easement extends to the members of the tenant's family and to all his guests and invitees. *Bacon* v. *Jaques*, 312 Mass. 371, 373, and cases cited."

Regulation is Void Because of Censorship

Provisions of ordinances and municipal regulation of door-to-door callers in communities similar to the provisions of the device in this case have been time and again declared invalid because providing for censorship. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Saia* v. *New York*, 68 S. Ct. 1148 (June 7, 1948).

Regulation is Void Because of Prohibition of Door-to-Door Distribution

Regulations which prohibit absolutely the distribution of literature and preaching from door to door on private property are void.

Laws or regulations prohibiting, either expressly or impliedly, door-to-door or house-to-house calls by itinerant ministers distributing Bible literature, are unconstitutional

because abridging the right of freedom of press and of worship. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori*, invalid." (*Jones* v. *Opelika*, 316 U. S. 584, 595-596 (1942)). This was a statement by Mr. Chief Justice Stone in his dissenting opinion. This dissenting opinion was adopted as the opinion of the Court, following a reargument, when the majority decision was reversed. *Jones* v. *Opelika*, 319 U. S. 103 (1943). See also *Martin* v. *Struthers*, 319 U. S. 141 (1943), *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Schneider* v. *New Jersey*, 308 U. S. 147, 162 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88 (1939); *Carlson* v. *California*, 310 U. S. 108 (1939); *Near* v. *Minnesota*, 283 U. S. 697 (1931), holding that laws prohibiting the distribution or sale of literature are unconstitutional.

Prior-Consent-of-Tenant Provision Void

The regulation provides that before any distributor may call upon a tenant, a written invitation must be procured from the tenant and produced to the manager for his approval. This is unconstitutional and is a burden which abridges the constitutional rights of freedom of press and of worship exercised by petitioners in Parkchester. It is impossible to carry on door-to-door evangelism if the opportunity to discuss with the householder the message offered is denied.

The requirement of prior consent obtained in writing finds its genesis in the famous ordinance of Green River, Wyoming, from which this variety of ordinance gets its name. The ordinance was held valid as applied to peddlers of goods and merchandise in *Town of Green River* v. *Fuller Brush Co.*, 65 F. 2d 112 (C. C. A. 10th). The "Green River" type of law prohibits door-to-door calls and visits upon occupants of a household unless the caller has been invited previously. This kind of law or regulation has been held

void and unconstitutional by the great weight of authority in many jurisdictions in the United States.

The leading cases of the various jurisdictions making this holding are here cited: *City of Orangeburg* v. *Farmer*, 181 S. C. 143, 186 S. E. 783 (1936); *Jewel Tea Co.* v. *Bel Air*, 172 Md. 536, 192 A. 417 (1937); *Prior* v. *White*, 132 Fla. 1, 180 S. 347 (1938); *White* v. *Town of Culpeper*, 172 Va. 630, 1 S. E. 2d 269 (1939); *City of McAlester* v. *Grand Union Tea Co.*, 186 Okla. 487, 98 P. 2d 924 (1940); *City of Columbia* v. *Alexander*, 125 S. C. 530, 119 S. E. 241 (1923); *Real Silk Hosiery Mills* v. *City of Richmond, Calif.*, 298 F. 126 (1924); Ex parte *Maynard*, 101 Tex. Cr. R. 256, 275 S. W. 1070 (1925); *New Jersey Good Humor, Inc.* v. *Board of Comm'rs*, 124 N. J. L. 162, 11 A. 2d 113, 114 (1940); *Jewel Tea Co.* v. *City of Geneva*, 137 Neb. 768, 291 N. W. 664 (1939); *Hague* v. *C. I. O.*, 101 F. 2d 774; 307 U. S. 496 (1939); *City of Mount Sterling* v. *Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. 2d 237 (1941); Ex parte *Faulkner*, 143 Tex. Cr. R. 272, 158 S. W. 2d 525 (1942).

When applied to the activities of Jehovah's witnesses from door to door the "Green River" ordinance has been held to be an unconstitutional abridgment of the civil rights as construed and applied. See *Zimmermann* v. *Village of London, Ohio*, 38 F. Supp. 582 (April 1941), and *Donley* v. *Colorado Springs*, 40 F. Supp. 15 (August 1941). This same type of ordinance, in order to avoid the holding of unconstitutionality in the case involving one of Jehovah's witnesses, was construed not to apply to Jehovah's witnesses in their door-to-door missionary work. *Shreveport* v. *Teague*, 200 La. 679, 8 S. 2d 640 (1942). In one case where this type of ordinance was applied to Jehovah's witnesses, it was held to be invalid on its face. *De Berry* v. *La Grange*, 62 Ga. App. 74, 8 S. E. 2d 146 (1940). The Georgia Court of Appeals in this case merely went along the path, fixed by such greater weight of authority, which concludes that the "Green River" type of ordinance is void on its face

and unenforceable, even against door-to-door calls for commercial purposes.

The decision in *People* v. *Bohnke*, 287 N. Y. 154, 38 N. E. 2d 478 (1941) (certiorari denied, 316 U. S. 667; rehearing denied, 316 U. S. 713), involving a "Green River" ordinance and relied upon by the courts below, was apparently overruled *sub silentio* by the decision of this Court in *Martin* v. *Struthers*, 319 U. S. 141 (1943). Two years after the denial of certiorari in the *Bohnke* case, this Court decided the *Martin* case from Ohio. The City of Struthers passed an ordinance making it unlawful for "any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills." This Court, in 1943 (319 U. S. 141), struck down that ordinance as an unconstitutional infringement of freedom of speech, press and worship, of (1) the person engaged in the activity and (2) the person who receives the message from the distributor.

The Court said: "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Martin* v. *Struthers*, 319 U. S. 141, 146-147.

In connection with the denial of certiorari in the *Bohnke* case, the Court's remarks in *House* v. *Mayo* (324 U. S. 45, 47, 48) are appropriate: "The district court also referred to a denial by this Court of a petition for certiorari, filed

here after the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo,* 322 U. S. 710. The district court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this Court imports no expression of opinion upon the merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; *State of Ohio* ex rel. *Seney* v. *Swift & Co.,* 260 U. S. 146, 151; *United States* v. *Carver,* 260 U. S. 482, 489; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403, 404." *House* v. *Mayo,* 324 U. S. 45, 47, 48. See also *Wade* v. *Mayo,* 68 S. Ct. 1270, 1274.

The trial court in its decision, which was approved by the New York Court of Appeals, misconceived and misapprehended the dictum of the case of *Martin* v. *Struthers,* 319 U. S. 141. The trial court said that the device here challenged is that type of regulation indicated by the Court to be valid in the opinion in *Martin* v. *Struthers.* [999-1001] The trial court quoted extensively from the opinion in the *Martin* case. [999-1001] It is quite obvious that the quotation does not support the conclusion reached by the courts below. For instance, the regulation in this case does precisely what was condemned in the *Martin* case, in this language: "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors." (319 U. S. 141, 147) [1000] The "traditional legal methods" for the protection of each householder are found in the trespass statutes of New York. If a door-to-door caller refuses to leave when ordered to do so by the tenant, he makes himself liable for prosecution under the trespass statutes. The Penal Code of New York sufficiently protects the householder whether he be a tenant or not, without any further regulations promulgated by the property owner or landlord. The Penal Code, Sec-

tion 2036, provides: "A person who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof, or who erects or occupies thereon any hut, or other structure whatever without such authority; and a person who places, erects, or occupies within the bounds of any street or avenue of a city or village, any hut, or other structure, without lawful authority, is guilty of a misdemeanor."

Considerable discussion was made by the trial court who claimed that the regulation leaves the matter of house-to-house calls with the tenants themselves. In *Martin* v. *Struthers,* 319 U. S. 141, it was suggested that an ordinary trespass law or a special trespass law which made it an offense to call at or knock on a door where there was a suitable indication or previous warning not to call or knock would be permissible. By casuistry the landlord, and the courts below, in these proceedings likened the regulation to the one suggested by this Court in the *Martin* case that may be found valid. There is no analogy between the two.

The ordinance proposed by the National Institute of Municipal Law Officers, mentioned in the *Martin* case, prohibits knocking on doors or ringing door bells where the householder has previously indicated that he did not desire the proposed visit. This is a special trespass law to prevent the annoyance of a knock from one warned not to return. But the device of the respondent is quite different. It does not proscribe trespass or knocking on doors where the tenant has previously indicated that the visit, return visit or knock is forbidden. It prohibits all door-to-door calls outright. It prevents any visitation upon the tenant by Jehovah's witnesses unless permission in writing previously obtained is exhibited to the manager of the community. This plainly is not a trespass law or a regulation devised to prohibit trespass. It is a regulation which attempts to make a nuisance out of that which is lawful and make trespass that which is not trespass under the common law of

the State of New York. Therefore the regulation sired by the respondent in this case gets no succor from the dictum in the *Martin* case above referred to. It just does not come in the class of the law mentioned by the National Institute of Municipal Law Officers.

The regulation does not leave the matter of calls with the householders of Parkchester, as does the general trespass statute or the proposed special trespass legislation. Such plainly valid law prevents unwanted knocking at the doors or ringing of door bells by visitors warned to stay away by the householder. The regulation here challenged is, like what this Court said of the ordinance in the *Martin* case, a determination by the community of Parkchester to stop door-to-door calls by Jehovah's witnesses which cannot be constitutionally done by a municipality. Since a municipality does not have the power to make such a determination for the householder the community of Parkchester does not have that power either, merely because it happens to be operated by a single private owner.

The device in this case, erroneously described as a regulation, does not purport to protect the "householder who has appropriately indicated that he is unwilling to be disturbed." [1001] The regulation here bans all door-to-door visits. It is not confined to a prohibition of visits to homes where appropriate indications had been made by the tenant that he was unwilling to be called upon. The regulation does not leave the decision "where it belongs—with the homeowner himself." [1001] The regulation does not let the visit depend upon the will of the householder, but "upon the determination of the community" [1001] of Parkchester that promulgated the regulation.

It is wholly unnecessary for Parkchester community to augment the Penal Code by the promulgation of its regulation. The health, welfare and property of the residents of Parkchester are sufficiently protected by the Penal Code pro-

visions prohibiting trespass. Admittedly respondent does not enforce the regulation to protect its property rights and interest in this action. It claims that the regulation was promulgated for the peace and security of the tenants. It is for the tenants and residents of Parkchester to determine in each case, as callers go from door to door, whether or not they desire to receive such visitors. If a caller refuses to pass on when ordered to do so, he is subject to prosecution under the trespass statute. That adequately protects the tenant. The Parkchester regulation is wholly unnecessary for the protection of the tenants and residents.

The New York trespass statute authorizes a conviction of one who calls at a home in defiance of the previously expressed will of the occupant. "A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers." (*Martin* v. *Struthers*, 319 U. S. 141, 148) The device or regulation here in question does not purport to do either of these things.

The provision that one must have prior written consent before calling upon the householder is incongruous. The only effective way that such consent could be procured would be to call upon the householder first. One would be compelled to violate the regulation in order to comply with it to procure the written consent. The ridiculousness of such requirement is apparent upon the face of the device.

If it is made unlawful to summon a person to the door to receive the printed message unless one had been invited in writing to do so, how could petitioners and Jehovah's witnesses know whether the persons were interested or not? If denied that right to call the people to the door, it would require mailing the publications or calling by telephone at a later date, which would double the inconvenience of the parties that could easily be spared by a contact with the householder and discussion on the first visit.

The regulation deprives householders of their inherent right to determine whether or not they will receive from distributors of literature pamphlets or other publications, which are and rightly can be offered from house to house or door to door. The individual distributors have a vital message to deliver to residents of Parkchester. If they cannot discuss with the residents the literature until after written permission is obtained, it is necessary that a letter be written to each person or a call made by telephone. Are we to expect that the distributor of information and opinion in printed form must make a mailing list or a telephone list of all the residents of each apartment building where he aims to deliver literature and then write or telephone each individual resident in an attempt to procure written permission from the resident who is interested in the literature? That would impose an impossible burden upon the disseminator of ideas. It would also place a very burdensome duty upon the householder. It would require a work which would become a greater burden to the tenants and other members of each householder in Parkchester than the summoning of the householder to the door in the first instance.

The Parkchester regulation places the cart before the horse. It makes the activity completely impractical and effectively deprives the disseminator of ideas of all right to distribute literature.

The regulation cuts off from the distributor his main, if not sole, avenue of communication of information and opinion and invitation to study Bible literature or attend Bible meetings. He is denied more interested persons for want of contact. The regulation cuts off the necessary democratic, social intercourse among people, and thereby makes it dangerous for one citizen to call upon and visit his neighbor for such lawful purposes.

Discriminatory Enforcement of Regulation Invalidates It

The respondent has permitted, under the provisions of the regulation authorizing it to do so, other charitable organizations to call from door to door in Parkchester. [287, 289-290]

Allowance of solicitation by other organizations and permitting them to make door-to-door calls is discrimination of a type which violates the equal protection clause of the Fourteenth Amendment. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Shelley* v. *Kraemer,* 68 S. Ct. 836 (1948).

The very purpose of the Constitution is to equalize the rights of every individual and make the same in every state and subdivision thereof, and these rights cannot be taken away by arbitrary discrimination by a community like Parkchester.

The very purpose of the "equal protection" clause is to insure equality of freedom of locomotion, travel and commerce for all inhabitants of the states and of subdivisions thereof.

Here the attempted enforcement of the Parkchester regulation amounts to class legislation and discrimination against some and favoring of others. Even all door-to-door callers under the regulation are not treated alike. The Red Cross, Boy Scouts, and others, are favored over Jehovah's witnesses. Additionally, the regulation as enforced and applied does not treat equally all persons who, though not peddlers, are desirous of exercising press activity within boundaries of the community.

In *Truax* v. *Corrigan,* 257 U. S. 312, 331-333 (1921), it is said: "But the framers and adopters of this [Fourteenth] amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific

guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

Certainly it is unreasonable to allow one person or class to call from door to door and exclude others, particularly where the entranceway to each building is open and there is an implied invitation or consent to come upon the premises.

Petitioners Protected by Fourteenth Amendment

It will be unnecessary for this Court to consider this point if the Court, like the New York Court of Appeals, decides the question as though a municipal ordinance was involved and applies the principles of the former decisions of this Court involving Jehovah's witnesses, which have been cited to the Court. But in event the Court deems it advisable to consider the contention, which was made by respondent in the courts below, that the Fourteenth Amendment does not reach petitioners, then this portion of the discussion should be considered.

The respondent asserts that since there are no criminal sanctions in the regulation and inasmuch as the respondent could not provide for criminal sanctions the regulation does not amount to law. It has been held that it is not necessary for a regulation to have criminal sanctions. A regulation without criminal sanctions may be the basis of invoking the Fourteenth Amendment when it is tested in judicial proceedings. *Hamilton* v. *Regents,* 293 U. S. 245 (1934); *Sterling* v. *Constantin,* 287 U. S. 378 (1932). It should be remembered that the respondent could easily give criminal sanctions to the regulation by instituting criminal proceedings charging trespass against petitioners for going from door to door in Parkchester contrary to the provisions of

the regulation. In fact the reason petitioners went to the civil courts was because of the failure of respondent to invoke the criminal process and took the law enforcement into its own hands.

If the respondent had resorted to the criminal process of the judiciary of the state by prosecuting petitioners for trespass there would be no question that such action would entitle any one of petitioners prosecuted as a trespasser to invoke, in defense to the criminal charge of trespass, the Fourteenth Amendment. In fact respondent would have to concede the right. *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Tucker* v. *Texas,* 326 U. S. 517 (1946).

Here the respondent has invoked, instead of the criminal process, the civil process of the judiciary of the state. This it did by seeking affirmative relief against petitioners through asking in its trial amendment for a declaratory judgment approving its enforcement of the regulation. This action by respondent constitutes grounds for petitioners to invoke the Fourteenth Amendment. The respondent, as stated above, in its trial amendment, demanded a judgment against petitioners. The trial court granted the declaration prayed for by respondent. This declaratory judgment is *res judicata.* It settles the rights of the parties as much as did the criminal action in the *Marsh* and *Tucker* cases. Should any of petitioners attempt to exercise his rights of preaching from door to door in Parkchester he would be subject to imprisonment for contempt of court. A violation of the judgment carries penalties and thus sanctions is given to the regulation promulgated by respondent. See Borchard *Declaratory Judgments,* Second Edition, pp. 438-442.

The action of respondent in praying for a declaratory judgment and the granting of it to respondent by the trial court gives petitioners the right to resort to the Fourteenth Amendment because this is state action. The latest decisions

applicable on this point are *Shelley* v. *Kraemer,* 68 S. Ct. 836 (1948); and *Hurd* v. *Hodge,* 68 S. Ct. 847 (1948).

It is only reasonable and just that petitioners should be entitled to invoke the Fourteenth Amendment in this case. It would be highly unfair to refuse them access to it in the circumstances. Petitioners claimed that the Constitution gave them the right to work in Parkchester from door to door as they do in other communities. Although contesting their right, respondent never invoked the criminal process to judicially settle the matter. Respondent has repeatedly caused its private police to take petitioners and Jehovah's witnesses into custody and deport them from Parkchester. These were arrests. While it is true no summons or complaints were made to institute criminal proceedings, petitioners were nevertheless arrested and deported, which were false arrests at that. Under such circumstances they were forced to appeal to the civil courts for relief in the form of a declaratory judgment and injunction. This was their only remedy, because they were denied the right to raise the issue in criminal proceedings, since respondent refused and failed to institute criminal proceedings but illegally deported them from Parkchester because of the alleged trespass. (See *Hague* v. *C. I. O.,* 307 U. S. 496.) Respondent merely took the law into its own hands by using its power of arrest to deport Jehovah's witnesses. If through this device persons can be denied their right in the New York courts to invoke the Fourteenth Amendment to claim protection of their rights guaranteed under the First Amendment, then equal justice and fairness dictate that it is high time some steps are taken by this Court to obviate predicaments like those in which respondent desperately attempts to put petitioners. Certainly petitioners should be granted by this Court the same rights in these proceedings as they would have had in criminal proceedings that could have been brought for trespass involving

the same facts and the same regulations that are now being considered.

But for the purpose of argument let us assume that what the respondent says is correct, that it is a mere private owner and operator of private apartment buildings, the same as an operator of a single apartment building. The respondent has, nevertheless, resorted to state law to enforce its policy in the regulation challenged here. This enforcement of the regulation against petitioners entitles them to resort to the Fourteenth Amendment to turn up the bulwark of the First Amendment guaranteeing civil liberties.

The respondent has resorted to self-help in the enforcement of the regulation. Thereby it has converted the alleged private regulation into state action. Its private police have taken the law into their own hands. They have falsely arrested petitioners, taking them into custody, and have forcibly and physically deported petitioners from Parkchester. The respondent admits this. It stipulated upon the trial that it would continue to do this for all time to come in the future or as long as petitioners attempted to carry on their door-to-door activity in Parkchester. [60-61]

The false arrests of petitioners because they were alleged by the police force of Parkchester to be trespassers were arrests made pursuant to authority vested in the private police of the Parkchester protective division by the Code of Criminal Procedure, Section 183. This section authorizes arrests by private persons. See *Johnson* v. *May*, 189 App. Div. 196. Thus their so-called private action became state action. *Hague* v. *C. I. O.*, 307 U. S. 496 (1939).

The illegal conduct of the Protective Division of the community of Parkchester in the enforcement of the regulation against petitioners, although claimed to be private, constitutes action taken under color of state law so as to entitle petitioners to invoke the restraint of the First Amendment through the Fourteenth Amendment. See

Sellers v. *Johnson*, 163 F. 2d 877 (C. C. A. 8th, 1947) where a sheriff used private persons to block roads to keep Jehovah's witnesses out of Lacona, Iowa, resulting in prevention of entry by Jehovah's witnesses into a public park to hold a Bible lecture. See also *Screws* v. *United States*, 325 U. S. 91, 107-110, 127-128 (1945); and *Catlette* v. *United States* 132 F. 2d 902 (C. C. A. 4th, 1943). In *United States* v. *Classic*, 313 U. S. 299, at page 326 (1941), it is stated that "misuse of power, possessed by virtue of state law made possible only because the wrong-doer is clothed with authority of state law, is action taken under color of state law."

Grievous Error Committed in Receiving Poll Into Evidence

The respondent took an ex parte deposition of all the inhabitants of Parkchester before trial without notice to petitioners. Upon the trial, although this hearsay evidence related to an immaterial issue, the trial court, over objections duly made by petitioners, received such evidence and considered it in reaching his final determination.

The proof of the circulation of the petition by petitioners among the tenants of Parkchester was not a concession that the ruling of the trial court on the ex parte deposition or "poll" by Parkchester was legal. Petitioners were justified in combating illegal evidence with the same kind of testimony. They were forced to resort to such steps. Such petition was for the sole purpose of cross-examining the "poll" and impeaching the illegal ex parte deposition taken by Parkchester.

The petition received in evidence was subject to the same objection made by petitioners to the referendum. The offer of such incompetent testimony by petitioners to refute the incompetent testimony received by the court from respondent does not constitute a waiver of petitioners' objec-

tion that the evidence received by the court from respondent was inadmissible. *Mance* v. *Hossington*, 205 N. Y. 33, 38; *Worrall* v. *Parmelee*, 1 N. Y. (1 Const.) 519; *Douglas* v. *New York Elevated Ry. Co.*, 14 App. Div. 471.

Petitioners objected to the evidence on the ground that, if received and considered by the court, it violated their rights to freedom of speech, press and worship and deprived them of their liberties without due process of law. This objection raised constitutional questions that should be considered.

The permission to exercise fundamental personal rights does not depend upon obtaining popular vote. Those rights cannot be denied even when popular majority vote is against the exercise of them. Even an ordinance that prescribes for the issuance of a permit only upon "the recommendation of twelve citizens and tax payers in the block" is unconstitutional. In re *Quong Woo*, 13 F. 229. See also Ex parte *Sing Lee*, 96 Cal. 354; *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). This is especially true when the exercise of fundamental personal liberties is involved, such as freedom of speech, press and worship. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The exercise of such liberties does not depend upon the arbitrary whim and capricious will of residents within a community. *Hays* v. *City of Poplar Bluff*, 263 Mo. 516. See also *Eubank* v. *Richmond*, 226 U. S. 137 (1912).

This Court should hold that the trial court erred in receiving and considering such evidence. This Court should disregard entirely such evidence in rendering the judgment that should have been rendered by the trial court. In event the Court is not disposed to disregard and strike the evidence, then petitioners say that the judgment of the courts below should be reversed and the cause remanded for a new trial because of the errors committed by the trial court in receiving and considering such evidence.

Conclusion

If the position taken by the courts below that the property rights of landlords confers upon an apartment community the power to censor and prohibit the exercise of civil rights within the community be sustained, a formidable weapon has been forged which defeats the very purpose of the Constitution. There is no end to the walls of imprisonment which such an engine can build high around the millions of apartment dwellers in the nation, including New York City. The devastating consequences will be even greater in the future as the number of great housing projects increase and apartment communities multiply throughout the nation.

Whole communities are now, and have been for many years, owned by one person or corporation in this country. They are commonly referred to as company-owned towns. All dwelling and business buildings in them are rented by the one owner. Usually a gigantic mining company or industrial concern constructs such communities and controls them. Although such places have no municipal government ordained by the state the single owners promulgate private regulations for the conduct of people in their boundaries. Frequently such towns are quite large. In the United States there are scores of such privately owned towns. In note 5 of the opinion of this Court in *Marsh* v. *Alabama,* 326 U. S. 501, 508, there is reference to source material where a more detailed description of such towns may be found. See also *Housing Statistics Handbook,* Housing and Home Finance Agency, Office of Housing Economics (Government Printing Office, Washington, 1948.)

In this postwar era there is a growing tendency of great and expanding private corporations, like respondent, and also government agencies or government-controlled corporations, to buy large sections of property for redevelopment and housing projects. On such properties the owners build

large apartment communities and towns. The residence and business spaces are not sold. They are rented from the single landlord. The government of such projects also is by private regulation. One of the smaller of such projects was involved in *Tucker* v. *Texas*, 326 U. S. 517 (1946).

Certainly portions of the State of New York cannot be withdrawn from the reach of the Constitution by purchase and maintenance of private residential apartment communities. Surely the political and democratic process, the life of which is so dependent on primitive door-to-door visitation, cannot be curtailed. The door-to-door activity of that process is not such a serious and present danger to dwellers of an apartment community as to justify measures that cannot stand the constitutional test in an ordinary community of dwellers of single homes. The rights of apartment dwellers do not rest on any such tenuous basis. The liberties of the people of the United States are as strong and as secure in a community of apartment buildings as in a community of single dwellings. The specious argument of the trial court and the logistical legerdemain of respondent is subversive of this fundamental proposition. The alien doctrine they advance should be nipped in the bud here in this Court.

There can be no question that the court approval of the part of the regulation requiring a permit from the manager of the community is in direct conflict with and flouts many decisions of this Court where the same provision has been invalidated time and again. While this Court has not expressly decided that the "Green River" type of law is invalid as applied to distribution of literature it is fair to state that the Court has implicitly disapproved such laws as a burden, abridgment and prohibition of door-to-door activity in *Martin* v. *Struthers*, 319 U. S. 141 (1943). On the authority of the many decisions by this Court in cases involving Jehovah's witnesses, heretofore cited, it is submitted that the decision below is plainly erroneous and

that it would be appropriate, without more, to grant the writ of certiorari and reverse the judgment of the courts below on the grounds that they are not compatible and flout the decisions of this Court, which would not require an oral argument and further hearing in this Court. This was done in *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715 (1943); rehearing denied 320 U. S. 816 (1944); and *United States* v. *Balogh,* 329 U. S. 692; rehearing denied 329 U. S. 835 (1947). Compare *Mathews* v. *West Virginia,* 320 U. S. 707 (1943).

This action could be appropriately taken, notwithstanding the Court has not expressly declared the "Green River" law to be invalid. Even assuming the "Green River" provisions of the regulation to be valid, the judgment should, nevertheless, be reversed because of the manifest error of the court in holding that the requirement of a permit from the community manager is not a violation of the constitutional rights of petitioners. If any one of the provisions of the regulation is invalid the judgments cannot stand even though the other provisions may be valid. *Stromberg* v. *California,* 283 U. S. 359, 364-368 (1931); *Williams* v. *North Carolina,* 317 U. S. 287, 291-292 (1942).

Prayer for Relief

WHEREFORE petitioners pray that this Court issue a writ of certiorari to the Supreme Court of New York County, the court to which the Court of Appeals remitted the record, and which court now possesses the record in this case, so that this Court can review the decisions and judgments of the Court of Appeals of the State of New York, the Appellate Division, First Department, of the Supreme Court of New York, and the Supreme Court of New York County, directing such court to certify to this Court for review

and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the Court of Appeals, affirming the judgments of the inferior courts of New York, be here set aside simultaneously with the granting of the writ of certiorari and the cause remanded to the court below for further proceedings consistent with the decisions of this Court; or, in the alternative such relief be granted after oral argument and submission to this Court following the granting of the writ of certiorari; and petitioner prays for such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE and
EARL W. HITCH, *Petitioners*

By

HAYDEN C. COVINGTON

GROVER C. POWELL
Counsel for Petitioners

Supreme Court of the United States

OCTOBER TERM 1948

No. 187

◆

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE
and EARL W. HITCH

Petitioners

v.

METROPOLITAN LIFE INSURANCE COMPANY

Respondent

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW YORK COUNTY
STATE OF NEW YORK

REPLY TO MEMORANDUM IN OPPOSITION

HAYDEN C. COVINGTON
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Counsel for Petitioners

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REPLY TO MEMORANDUM IN OPPOSITION

MAY IT PLEASE THE COURT:

It is hoped that this belated reply to the respondent's memorandum in opposition will be considered by the Court before the petition is determined. The memorandum in opposition confuses rather than clarifies the issues presented upon the petition.

The memorandum states that neither the Court of Appeals nor the lower courts of New York treated the regulation as though it were a municipal ordinance. (4)[1] This statement seems to be at variance with what the respondent tells the Court under subdivision 3 under the heading The Opinions Below. (3) The reason the Court of Appeals reserved for decision the question of whether the Fourteenth Amendment reached the petitioners was because the court had found the case to be controlled by *People* v. *Bohnke,* 287 N. Y. 154, which held valid a municipal ordinance similar to the device employed by the respondent in this case. See record pages 1028-1029.

The express reservation of this question by the Court of Appeals implicitly rejects the contention of the respondent that the Court of Appeals tacitly approved the holding of the trial court that a private regulation was not subject to the prohibitions of the Fourteenth Amendment. (4-5) It would be inconsistent for the Court of Appeals to tacitly approve a proposition of law which it expressly declined to pass upon. The opinion of the Court of Appeals, when given a reasonable construction, cannot be taken as approving the holding of the trial court that the Fourteenth Amendment does not reach petitioners.

If this Court concludes that the question of whether the invalidity of the regulation is reached by the Fourteenth Amendment was not passed upon by the court below and may not be considered here for that reason—rather than dismiss or deny the petition for writ of certiorari as suggested by the respondent (20-28, 29)—the Court should vacate the judgment and remand the case to the Court of Appeals as was done in *Musser* v. *Utah,* 68 S. Ct. 397 (decided February 9, 1948), where the Court said: "We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to

[1] Figures appearing in parentheses refer to pages of respondent's memorandum in opposition to petition for writ of certiorari.

deal with this ultimate issue of federal law and with any state law questions relevant to it." (68 S. Ct. at p. 398)

The petitioners, however, are willing to have this Court pass upon the question of whether the Fourteenth Amendment shields them against the impact of the regulation without remanding the case to the Court of Appeals. This Court is as competent to deal with this question now as it will be after the Court of Appeals has passed upon this question. There are no state questions that remain to be determined in the case which may result in a different determination in the court below, as existed in the case of *Musser* v. *Utah,* 68 S. Ct. 397. It is therefore suggested that, rather than dismiss the petition or even remand the case to the Court of Appeals, the Court should grant the petition for writ of certiorari and instruct counsel to brief this question and argue it before the Court.

The respondent attempts to lead the Court to believe that it did not resort sufficiently to self-help and take the law into its own hands to the extent that it justified the petitioners to invoke the Fourteenth Amendment. The petitioners have attempted to demonstrate that respondent has taken the law into its own hands so as to make it answerable, as though it were a state agency. See petition pp. 41-42. The respondent has denied that it used self-help. (22, 24)

In its memorandum in opposition, however, it does admit excluding Jehovah's witnesses from Parkchester. (24) Upon the trial the respondent stipulated that, if Jehovah's witnesses attempted to carry on their work, its policy would be enforced by "stopping said plaintiffs and preventing them from carrying on the aforesaid activities at Parkchester." See record page 61. The testimony offered by the petitioners, which was undisputed and unimpeached, showed that the guards ushered Jehovah's witnesses out of the apartment buildings and would not permit them to re-enter and upon every occasion that Jehovah's witnesses were discovered going toward the apartment buildings they

were denied the right to enter. See record pages 442-446, 452-456, 475-478, 497-499.

In view of the stipulation made upon the trial and the undisputed evidence it seems that the respondent should be estopped to deny that it did not take the law into its own hands so as to justify the petitioners in fleeing under the protecting wings of the Fourteenth Amendment, which mirrors the provisions of the First Amendment.

In any event, assuming that the Court does not find that the respondent has sufficiently donned the cloak of state authority by taking the law into its own hands by excluding Jehovah's witnesses from Parkchester buildings, the petitioners are, nevertheless, entitled to make use of the protecting shield of the Constitution. The reason for this is that the respondent has asked for affirmative relief. See the record at page 53. The court granted such affirmative relief in the form of a declaratory judgment. The judgment presented for review by this Court has the same legal effect as if it were rendered in a declaratory judgment action brought by the respondent against the petitioners. The judgment not only declares the regulation to be valid, as construed and applied to petitioners, under the Constitution, but it also legally approves the taking of the law into its own hands by respondent. The trial court said that the respondent had "the legal right to remove [petitioners] from said apartment buildings by the use of such force as may be lawful for that purpose." Record page 57. The fact that no injunctive relief was granted to the respondent is immaterial. The declaratory judgment carries with it the right to supplemental relief in the form of civil sanctions known as injunction. The coercive relief is at the disposal of the respondent at any time in the future that respondent desires to invoke it. The judgment is final. The finality of a declaratory judgment in favor of the respondent is, in legal effect, an injunction. No one would doubt that the Constitution could be invoked if the respondent had brought

an injunction action against the petitioners and procured a judgment for injunction. The injunction has been granted by the declaratory judgment but remains dormant until such time as it is invoked by the respondent through application for supplemental relief. See the petition pages 38-41.

The respondent says that the provisions of the First Amendment cannot be invoked by the petitioners through the Fourteenth Amendment because of the holding of the Court in the *Civil Rights Cases*, 109 U. S. 3 (1883). If the Court accepts this argument then the petitioners call upon the Court to reconsider and set aside its ruling in those cases because the holding in the *Civil Rights Cases* is erroneous and does not properly announce the law.

Upon the merits the respondent, as in the courts below, leans heavily upon the so-called poll. The illegality of this *ex parte* deposition (sired and nourished by the respondent while negotiations toward settlement were going on between counsel at about the time the action was begun) was demonstrated in the petition. See pages 14-16, 42-43. The *ex parte* deposition was objected to by the petitioners on the grounds that it was a violation of the due process clause and constituted an undue abridgment of their rights guaranteed by the First Amendment. The grounds are explicitly stated at pages 300-318 of the record, and are incorporated and made a part hereof.

To begin with, the so-called poll unfairly presented the issue to the tenants. The poll inquired whether each tenant wanted Jehovah's witnesses to visit him in his apartment, rather than whether the tenant had objections to Jehovah's witnesses' going from door to door. The poll was wholly irrelevant, immaterial and hearsay, and was an illegal effort to establish that the tenants had directed Jehovah's witnesses not to call. This proof was offered to establish trespass against the tenants on the part of Jehovah's witnesses. The action did not involve trespass by Jehovah's witnesses against the tenants. That issue was not in the case. The

issue was whether Jehovah's witnesses committed trespass against the respondent-landlord and whether the regulation was a valid measure to deal with that trespass. No trespass against any one of the tenants was proved. The finding of trespass by the trial court was based upon the alleged invasion of the landlord's rights. The poll is a mere sugar-coating or white-washing of the illegal conduct of the respondent. The respondent attempts to get retroactive approval by the tenants of its illegal conduct. More will be said about this so-called poll, if, as and when the brief in behalf of petitioners is filed. Furthermore, upon the trial, the poll was received in evidence and considered by the trial court for the limited purpose of establishing the reasonableness of respondent's regulation and not for the purpose of proving trespass against the tenants. Record 308, 310, 312, and 314.

WHEREFORE petitioners pray as in their petition for writ of certiorari.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioners

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 187.

WATCHTOWER BIBLE AND TRACT SOCIETY, INC., GEORGE KELLY, MAURICE L. HARE and EARL W. HITCH,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 187

WATCHTOWER BIBLE AND TRACT SOCIETY, INC., GEORGE KELLY, MAURICE L. HARE and EARL W. HITCH,
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v.

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek a writ of certiorari, under section 237(b) of the Judicial Code, 28 U. S. C. section 344(b) [now title 28, United States Code, section 1257(3)] to the Supreme Court of the State of New York, County of New York, to review a judgment on the remittitur of the New York Court of Appeals (Petition, p. 1).

This controversy involves the asserted constitutional right of the individual petitioners and others of Jehovah's Witnesses to enter into and to canvass within apartment buildings owned and operated in New York City by respondent, despite the expressed objections of respondent and its tenants.

The action is for an injunction and a declaratory judgment. Brought as a class action by the Watchtower Bible and Tract Society, Inc. (the Society) and three individual

plaintiffs of those known as "Jehovah's Witnesses", on behalf of Jehovah's Witnesses generally, its purpose is to compel Metropolitan Life Insurance Company, the owner and managing landlord in possession of the New York City apartment house project known as "Parkchester", to allow Jehovah's Witnesses free access to the interiors of the Parkchester buildings and unrestricted use of the halls, stairways and elevators for the purpose of soliciting contributions and selling theological tracts.

The Opinions Below.

The issues were fully tried before Pecora, *J.*, sitting without a jury and the resulting record is perhaps more complete as to the organization and administration of the Society and as to the activities and practices of Jehovah's Witnesses than any that has hitherto been considered by this Court.[1] The opinion of the trial court,[2] with which the New York Court of Appeals noted its full agreement (R. 1026[3]), resolved the issues as follows:

1. Respondent, as landlord of the apartment houses where Jehovah's Witnesses sought to canvass the tenants, was entitled to exclude petitioners from the Parkchester buildings unless they obtained the consent of the tenants upon whom they wished to call;

2. The regulation issued by respondent as an expression of this policy was the act of a private landlord,

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[1] *Cf.* Mr. Justice Jackson, dissenting, in *Douglas* v. *Jeannette*, 319 U. S. 157, 169 (1943).

[2] Set out at pages 988-1001, of the record and reported at 188 Misc. 978, 69 N. Y. S. (2d) 385 (1947).

[3] This and similar references are to pages of the record.

applied to private persons, and hence beyond the reach of constitutional prohibitions;

3. *But even* if the validity of the regulation were to be tested by the constitutional principles applied to state and municipal laws by the decisions of this Court in Jehovah's Witnesses cases[4], the regulation is valid as applied to petitioners, for this Court has never granted to Jehovah's Witnesses the untrammeled right to enter multiple dwellings and to use the passageways, elevators and stairways for their purposes.

A judgment to this effect was entered (R. 54-57), and unanimously affirmed by the Appellate Division (R. 1013). Petitioners then appealed to the New York Court of Appeals, which also unanimously affirmed.

The opinion of the Court of Appeals[5] was confined solely to the conclusions of the trial court stated in paragraphs 1 and 3 above, the court observing that its determination made it unnecessary to consider the conclusion stated in paragraph 2. The Court of Appeals carefully examined the more relevant decisions of this Court, decided that they did not authorize or sanction the right which petitioners here assert, and added that petitioners should not be accorded such right, saying:

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[4] *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Jones* v. *Opelika*, 316 U. S. 584 (1942) [vacated and judgments reversed 319 U. S. 103 (1943)]; *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U. S. 624 (1943); *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Tucker* v. *Texas*, 326 U. S. 517 (1946).

[5] R. 1023-29, and reported in 297 N. Y. 339 (1948).

> "A narrow inner hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand the free exercise of those ancient rights [of assembly, speech and worship]" (R. 1028).

In two important respects petitioners have misstated the holdings below:

I. *The regulation was not treated as a municipal ordinance.*

In an attempt to justify their insistence that they may assert here against respondent the same claims that would have been available in their defense if they had been convicted for violation of a municipal ordinance, petitioners assert that the lower courts treated respondent's regulation as if it were a municipal ordinance. They contend, therefore, that this Court likewise is bound to submit the regulation to the same searching constitutional scrutiny that would be directed to a legislative act (Petition, pp. 7-8, 17-18, 38). Neither the New York Court of Appeals nor any of the courts below so treated the regulation. No foundation exists in this record for such an assumption. This is a private controversy in which petitioners seek to enjoin respondent from excluding them from the interior common passageways of its private multiple dwellings in the absence of the consent of the tenants upon whom they wish to call. The trial court, affirmed by the Appellate Division, in its opinion expressly approved by the Court of Appeals (R. 1026), held the regulation to be the act of a private landlord governing the conduct of strangers within its building and, hence, not subject to the prohibitions of the Fourteenth Amendment. Having so decided, it additionally found that the policy adopted by respondent and expressed

in the regulation would not have violated those prohibitions, had they applied. Regarding the action in the most favorable possible light for petitioners, the Court of Appeals put aside the question of the applicability of constitutional principles and held that, assuming *arguendo* that the prohibitions of the Fourteenth Amendment did apply to the regulation, petitioners' rights of freedom of speech, press and worship had not been infringed. This contention having been decided adversely to petitioners, it was unnecessary for the Court of Appeals to consider whether those principles had any application to this controversy and that court expressly refrained from doing so (R. 1029). Nowhere did the New York courts hold that the regulation was, or was to be treated as, a municipal ordinance—in fact petitioners expressly admit that it is not (Petition, p. 5). Indeed, had there been no written regulation, the issues here would be exactly the same.

II. *There is here no "public streets" issue.*

Petitioners assure this Court that the Court of Appeals "blindly and summarily concluded" that constitutional safeguards do not extend to door-to-door distribution of literature on public streets (Petition, p. 20). The Court of Appeals concluded nothing of the sort. That issue was not before it, as it expressly recognized (R. 1028). What it did say was that petitioners could not invoke those safeguards, as delimited in the decisions of this Court, to provide a legal basis for their activities within the *interior* halls, passages and elevators of private apartment buildings (R. 1028). This dispute is localized to those interior areas, and the Court of Appeals so found, without in any way making a blanket condemnation of door-to-door activities such as petitioners profess to find in its opinion.

The Basic Issue.

Through a number of prior decisions of this Court, Jehovah's Witnesses have successfully established a considerable area of immunity from governmental action. Here, however, they have entered a new field. In this action they assert their constitutional rights, not against a governmental body, but against another private person—not as to a public place, but as to a private place.

There has been no general exclusion of Jehovah's Witnesses from Parkchester—even though petitioners extravagantly claim to have been "falsely arrested" and "deported" from the community (Petition, p. 5). Metropolitan has made no effort to put a halt to the activities of Jehovah's Witnesses upon Parkchester's streets and sidewalks. Long before the decision of this Court in *Marsh* v. *Alabama*,[6] which declared the right of Jehovah's Witnesses to enter such areas, respondent had raised no objection to their presence there, as the Court of Appeals has found (R. 1028).

Nor has respondent denied permission to Jehovah's Witnesses to make their calls at the apartments of individual tenants who have consented to such calls. To the contrary, it went to the trouble and expense of communicating with its tenants in Parkchester to find out which of them were willing to have such calls made (*infra*, pp. 14-16). It then informed the Society of the names and addresses of the consenting tenants and offered its services and cooperation in facilitating calls upon them by individual Jehovah's Witnesses (R. 1024).

Thus the basic issue of this controversy may be stated in relatively simple terms:

> May a person, merely by asserting that he is acting in accordance with his religious beliefs, enter

[6] 326 U. S. 501 (1946).

the private hallways of an apartment house over the objections of both landlord and tenants for the purpose of "preaching", *i. e.*, among other things, selling theological tracts and soliciting contributions?

The Facts.

A residential area of 129 acres in New York City known as Parkchester is the site of this dispute. Parkchester is comprised of 171 apartment buildings, varying from seven to twelve stories in height, and containing 12,272 separate apartments where live more than 35,000 persons (R. 256-57, 271). For the convenience of the residents, it contains shops, offices and other facilities which its size justifies (R. 956, 1023). Its size, however, is of no special significance in this case, for the argument of petitioners, if valid, would apply with equal force to a small apartment building or a modest rooming house, located in any city or hamlet of this country. Furthermore, when judged by its surroundings, Parkchester is dwarfed by the city of which it is a part[7].

Parkchester was built by respondent, a mutual life insurance company, as an investment for its policyholders' funds, and is managed directly and in every detail by respondent (R. 988, 1023). It was designed to accommodate families of moderate income, and the rentals are scaled accordingly (R. 956). Hence it lacks many of the facilities of "luxury" apartments, such as doormen and elevator operators (R. 274), who can inquire of the tenants whether a particular caller will be received.

The entire area of Parkchester is wholly owned by respondent, with the exception of three streets. Two of

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[7] Parkchester contains about 0.44% of the city's population and 0.41% of its land area.

these, complete with utilities, were built by respondent and turned over to the City of New York. All other streets are marked "Private Street" (R. 263-64, 273). Petitioners have conducted their activities without interference from respondent on all Parkchester streets, public or private (R. 1028). Here they ask this Court to enforce their claim that they are entitled to enter the apartment houses of Parkchester at will and to canvass the tenants as often as they wish (R. 1024).

History and Function of the Society: The origin of the Jehovah's Witnesses group, of which the individual petitioners are members, is comparatively recent. Its members have called themselves by that name only since 1931. Their beliefs and doctrine stem from the teachings and Biblical interpretations of Charles T. Russell, who in 1878 founded what he called "an organization of ministers" which has gradually evolved into the Jehovah's Witnesses sect[8].

In 1909 the corporate petitioner, Watchtower Bible and Tract Society, Inc., originally named Peoples Pulpit Association, was chartered under the Membership Corporations Law of the State of New York (R. 908-09). It is the governing body of the Jehovah's Witnesses (R. 8), and its membership is limited to forty men (R. 144), who receive their appointments from the president. But they take no active part in the direction of the Society's affairs (R. 144, 401, 605-06, 613).

The Society publishes material for distribution among the workers in the field and for further distribution under specified conditions to the public. These are issued *ex*

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[8] R. 66-69, and see generally STROUP, THE JEHOVAH'S WITNESSES (Columbia Univ. Press 1945), a careful study of the Witnesses, their origins and beliefs.

cathedra and individual Jehovah's Witnesses are vague as to their source, but the policies and doctrines so announced are accepted without question (R. 541, 560-62).

The output of such material by the Society is enormous. In the United States over three million 25¢ books, twenty million 5¢ booklets, hundreds of thousands of copies of the magazine "Watchtower" and "Consolation" (price to the public 5¢ per copy, $1 per year), and millions of advertising circulars, are annually printed, distributed and sold by the Society (R. 160, 166, 169, 395, 407, 410-14, 729).

Classification and Maintenance of Workers: There are now about 70,000 Jehovah's Witnesses, *all* of whom represent themselves and are represented by the Society as "ordained ministers" (R. 108, 347, 533-34). About six per cent of Jehovah's Witnesses are full-time workers; the others are part-time workers. The Society calls the full-time workers "special pioneers" and "pioneers"; they number from 4,200 to 4,500 persons (R. 344, 534). The remaining 65,000-odd Jehovah's Witnesses are "part time ministers" (R. 373, 534).

The President of the Society is maintained at "Bethel Home" and is provided with a drawing account of $24,000 subject only to his signature, to provide such cash as he may need for "various features of the work" while traveling (R. 721). The pioneers in the field receive commissions ranging as high as 400% from the sale of the Society's publications and special pioneers, in addition, are accorded a drawing account of $25.00 per month by the Society (R. 373, 689). "Part time ministers" receive no drawing accounts; their commissions approximate 25%; and they also engage in ordinary secular activities (R. 122, 168-69, 373, 537). As found by the trial court, amply supported by the record, all workers net a substantial profit from the dis-

tribution of the Society's books and booklets and "the Society is fully reimbursed by its ministers or workers for the literature which they distribute to the public and its gross income therefrom exceeds one million dollars annually, at least in recent years [*i.e.*, 1944 and 1945]" (R. 995).

"Preaching" by the Witnesses: In the field, by precept and example, Jehovah's Witnesses learn and practice methods of distribution which they sometimes liken to the invasion of a horde of locusts.[9] All these methods are termed "preaching of the Gospel," a term which they also apply to all their diverse activities, such as working at the Society's farms or in its printing plant, or presenting a petition at the doors of the Parkchester tenants charging respondent with misrepresentation (R. 864). The preferred methods of "preaching" consist of (1) street preaching, where the workers, bearing shoulder bags marked "Watchtower and Consolation 5¢", individually and in numbers solicit the passersby to purchase copies of the

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[9] "'They shall climb up upon the houses'. God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic Hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. 'They shall enter in at the windows like a thief.' They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the houses, into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the 'sourpusses' are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God's faithful witnesses, likened unto locusts, get the kingdom message right into the house and they take the veneer off the religious things that are in that house, including candles and 'holy water', remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat." From the Society's publication, *Religion*, p. 196 (Def. Ex. 5).

magazines and (2) house-to-house canvass (R. 102-03, 406). Supplementary to these methods, the Society uses other sales promotion devices, such as campaigns, special offers, quotas for workers, advertising by leaflets, radio broadcasts, sound trucks and portable phonographs (R. 159-60, 395-97, 433).

It is noteworthy that the Witnesses developed what they called a "special technique" during their canvassing at Parkchester, the declared object of which was to avoid giving respondent any basis for claiming "we were perhaps unreasonable at the door" (R. 501, 503).

Jehovah's Witnesses at Parkchester: In April, 1941, a female "pioneer" was assigned to work in Parkchester, denominated territory #324 (R. 439-41). For about sixteen days she canvassed in the apartment houses, and saw about 400 tenants (R. 451). Her testimony was that she found the tenants kind, although she found no one "definitely interested" (R. 441). During her sixteen visits there, the Parkchester guards requested her to leave on three different occasions (R. 450).

In October, 1941, another "pioneer" undertook to canvass the apartments and worked in Parkchester for a period of fourteen months, during the course of which she was requested to leave the buildings on six or seven occasions by the Parkchester guards (R. 457, 460). She made back calls on several persons who purchased publications from her and on such occasions she advised the guards that she was visiting a specific tenant and was permitted to continue (R. 467, 469). Covering on the average an apartment building each day, she finished by December, 1942 (R. 457, 464).

In February, 1943, special pioneer Kossak was assigned to Parkchester and worked there until November,

1944 (R. 474). In June of the same year special pioneer Fedorka and a group of Jehovah's Witnesses were also assigned to Parkchester (R. 475). Under the direction of the two special pioneers, Fedorka and Kossak, this group, working daily in pairs, succeeded in completely canvassing Parkchester's apartments for the second time in the period from June, 1943, to December, 1945 (R. 475).

Throughout the period, members of the group were requested to cease their activities on some forty occasions (R. 499). Nevertheless, by placing two men on the top floors working down and two men on the bottom floors working up, they were frequently able to finish an apartment building without interference from the guards (R. 977). Fedorka, who testified that he was stopped some fourteen times, "instructed the guard that as an ordained minister I was qualified to engage in house-to-house evangelistic services and that I was commanded to do so by the Most High God • • • and further I instructed the guard that I knew my legal constitutional rights, and I was guaranteed such rights to enter the Parkchester development to carry on my missionary activity there" (R. 497).

Meanwhile, in December, 1944, one of the petitioners, George W. Kelly, was appointed by the Society as unit servant of the South Bronx Unit, then composed of about 150 Witnesses (R. 524). "Special workers in Parkchester" were assigned to him by the Society (R. 526). Those special workers included special pioneers Hitch and Hare who also are petitioners here (R. 576).

Complaints by the Tenants: The individual Jehovah's Witnesses who testified at the trial were unanimous in portraying themselves as models of deportment when they made calls upon Parkchester tenants. While it is true

that there was none of the physical violence at Parkchester which often accompanies a visitation by Jehovah's Witnesses, there nevertheless was antagonism, quickly made known to the Parkchester management by telephone complaints from irate tenants (R. 771, 775-77).

The first official notice to Jehovah's Witnesses to discontinue their activities at Parkchester was given in 1944 by James P. McGannon, the Chief of the Parkchester Protective Division, a force of uniformed guards of whom three to seven are on duty at one time (R. 766-67). McGannon's request that the Witnesses discontinue their canvassing was ignored, and he was told that a religious message was being offered to the Parkchester tenants for thirty cents, "the actual cost of its printing" (R. 773). Later when McGannon intercepted another group of Jehovah's Witnesses, one of them argued his constitutional rights so persistently that McGannon suggested that the Society's counsel communicate with Metropolitan's attorney at Parkchester (R. 775).

There followed an exchange of letters in which both parties stood on their previously stated rights, *i. e.*, petitioners insisted that they were entitled to continue their activities in Parkchester, and respondent insisted that they must restrict their activities to tenants by whom they were expressly invited (R. 934-44).

Calls continued to be made into 1946 (R. 775). Complaints by tenants, which had been averaging five or six per month, increased, and by March, 1946, there were many complaints (R. 776). The Parkchester management finally decided that "the best thing to do was to get our tenants' view point" (R. 332). This resulted in the poll which petitioners in turn deprecate and excoriate.

Poll of the Tenants: On March 22, 1946, respondent sent a letter and return post card to each of its 12,200-odd tenants (R. 299, 317-18). The letter was scrupulously fair to Jehovah's Witnesses and stated the issue that had arisen in careful terms. Its evident purpose has been so distorted in the petition that it is reproduced in full in the margin.[10]

The letter asked each tenant to reply to the question, "Are you willing to have Jehovah's Witnesses visit you in your apartment?" The tenant was to fill in "yes" or "no", sign the post card (Def. Ex. H) and return it to the management. The response from the tenants was immediate and overwhelming. By April 3, 1946, nearly 8,000 post card replies had been received. Of these, 11 answered "yes", 7 were noncommital and 7,921 answered "no" (Def. Ex. R). Respondent promptly notified petitioners' counsel of this fact, furnished him with the names of the eleven willing

[10] "We have received numerous complaints from tenants with respect to the activities of Jehovah's Witnesses in Parkchester. For the information of some tenants who may not have received any calls from members of this organization, they go either individually or in groups from apartment to apartment, ringing doorbells, distributing literature, and expressing their religious views. If you desire more detailed information as to their activities, you may communicate with Lower Bronx Unit of New York Company of Jehovah's Witnesses, 1014 Southern Boulevard, New York, N. Y.

"As you may know there is a regulation (printed on the reverse side of this letter) in Parkchester generally prohibiting activities of this nature except within an individual apartment with the prior written consent or invitation of the particular tenant. We have felt it our duty to enforce, so far as possible, such a regulation in order to insure privacy and to prevent possible annoyance. We do not, however, desire that any such regulation be construed or be enforced in any way which might conceivably restrict anyone in the exercise of religious freedom, as guaranteed by the United States and New York State Constitutions. Any tenant willing to have Jehovah's Witnesses visit him in his apartment may do so.

"In order that each tenant may make known his wishes concerning calls by Jehovah's Witnesses, we are sending this communication and the enclosed card to all tenants. We should appreciate it if you would cooperate with us by stating your wishes on the card and mailing it at once. It is important that you act promptly. If you so desire, Jehovah's Witnesses will be permitted to visit you in your apartment." Def. Ex. G (R. 979-80).

tenants, and offered any needed cooperation to facilitate calls by Jehovah's Witnesses upon those tenants (R. 981-82).

On April 11, 1946—ten days after this action was commenced—respondent sent a second letter, likewise reproduced here,[11] to the one-third of its tenants who had not yet responded (R. 322-23; Def. Ex. M). It will be noted that this letter particularly advises all tenants *willing* to receive visits from Jehovah's Witnesses to return the post card with an affirmative answer, as the letter stated that Jehovah's Witnesses would be excluded from calling upon tenants who had not stated their willingness.

As the post card replies continued to come in, they were tabulated and checked against the tenant list (R. 318, 335). By May 9, 1946, according to respondent's records, a total

[11] "Since our letter of March 22, 1946, to our tenants regarding the activities in Parkchester of Jehovah's witnesses, court action has been commenced against us in which Jehovah's witnesses seek to compel access to the apartment buildings to call upon all tenants.

"More than two-thirds of the tenants have so far expressed their views as to such visits. Approximately 8,000 have stated they were not willing to receive visits from representatives of Jehovah's witnesses, while 11 have stated to the contrary. In the conviction that the wishes of these 11 should be met, the management has forwarded their names to the headquarters of Jehovah's witnesses with a statement that no objections will be made to calls upon them by representatives of Jehovah's witnesses.

"At the same time we believe that the wishes of the tenants who do not wish to receive such visits are entitled to equal respect. We intend, therefore, to oppose the court action brought against us in an effort to assure such tenants freedom from such unwanted calls.

"Some of you have not as yet stated your preference as to these visits. We particularly urge those who are willing to receive Jehovah's witnesses to notify us to that effect, as we shall carry out our regular policy of prohibiting solicitation, except where such notification or other written invitation is received. On the other hand, we also urge response from those who share the views of the majority, as the court will thus be informed of the will of the largest possible number of individual tenants.

"Will you, therefore, aid us in this matter by marking your preference on the enclosed post card and mailing it to us at once." Def. Ex. L (R. 983-84).

of 11,441 replies had been received, of which 74 were "repeats", 19 were noncommittal, and 28 were in the affirmative, leaving 11,323 in the negative (Def. Ex. R-1). Once again the names of the willing tenants were forwarded to petitioners (Def. Ex. I, N).

These post card replies were carefully checked during the course of the trial by a group selected by petitioners' counsel, and there was some minor dispute as to a few of the cards. The net result was, as the record clearly shows, that of the 12,200-odd tenants at Parkchester, not more than 28 expressed willingness to receive Jehovah's Witnesses, and over 11,000 expressly stated their unwillingness (R. 847-49).

Petitioners go to extreme lengths in their effort to discredit this poll—*e.g.*, by terming it "coerced" and a "pressurized plebiscite" (Petition, p. 15). There is not one word in the record to support these charges, or the equally extravagant assertion that the tenants answered in the negative because they feared eviction if they did otherwise (Petition, p. 15). The evidence is clear that respondent assumed the trouble and expense involved in polling its tenants not only in fairness to them, but also to Jehovah's Witnesses. The poll provided a convenient method of fairly ascertaining the wishes of both the majority and minority of the tenants, and of making it possible for respondent to observe the wishes of each group.

The Mass Invasion of Parkchester: Despite the pendency of this action to determine the rights of the parties, the New York Company of Jehovah's Witnesses was instructed by the Society to enter the apartment houses at Parkchester in force for the purpose of submitting a letter prepared by the Society and obtaining from the tenants signatures to a statement to the effect that the

tenant was willing for Jehovah's Witnesses to go from door to door in Parkchester (R. 584-85). Orders were issued and, without notice to Metropolitan, "well on the other side of 700" Jehovah's Witnesses appeared in Parkchester on Sunday morning, April 28, 1946 (R. 588).[12] In accordance with plan, four Jehovah's Witnesses entered into each of the 170 building entrances in Parkchester and, working in pairs, they called at each apartment in each building (R. 1757-66).

In the course of this mass invasion of Parkchester's apartment houses the signatures of approximately 1500 tenants[13] were obtained, which petitioners evidently regard as a considerable achievement (Petition, p. 15). The validity of this "poll", unlike that conducted by respondent, is seriously open to question. Whereas respondent's poll was made by mail, without any pressure of any kind upon the tenants, the Jehovah's Witnesses who solicited signatures to the petition were well instructed in the type of sales approach to be made. Employing the aggressive methods of persuasion so commonly associated with them, they freely charged respondent with misrepresentation.

As proof of the reliability of their canvass, petitioners point to the fact that less than ten tenants appeared at the trial to complain of the methods of Jehovah's Witnesses (Petition, p. 16). This overlooks the fact that the court rejected further testimony of this type from the tenants as cumulative (R. 822-39).

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[12] The use of large groups is not uncommon (R. 609-10); examination of Jehovah's Witnesses cases previous to this, however, indicates that this was the largest mass invasion yet made by them, the next largest, apparently, being the hundred-odd who invaded the town of Jeannette, Pennsylvania (pop. 16,000) on Palm Sunday, 1939 (*Douglas* v. *Jeannette*, 319 U. S. 157, 167-68 [1943]).

[13] Slightly more than 1700 signatures were obtained, but 240 did not, for one reason or another, appear to be signatures of tenants (R. 843-44).

Those tenants who did testify told of (1) misrepresentations by Witnesses—such as the assertion that 10,000 tenants had signed the petition (R. 829), (2) insistent arguments that the purpose of the petition was merely to protect the rights of Jehovah's Witnesses to free speech (R. 828-29) (in fact the petition did not state the willingness of the signer to have Jehovah's Witnesses call on *him*), and (3) such annoying techniques as making it impossible for the tenants to close the doors upon their unwanted callers (R. 800, 829). One tenant was induced to open her door by representations which led her to believe that her caller was from the post office (R. 824). Another tenant, in response to the argument that Parkchester was infringing on petitioners' rights, pointedly remarked that they were infringing on his right to be let alone, to which the Jehovah's Witnesses suggested that he put a "Please Don't Disturb" sign on his door (R. 784-85).

During this invasion 144 complaints were received by the Parkchester management (R. 779-80). Upon investigation McGannon found a group of Jehovah's Witnesses and observed them proffer the petition, charge Metropolitan with misrepresentation and persist in arguments with tenants in their efforts to obtain signatures (R. 778). When he requested the Witnesses to desist they refused (R. 779). McGannon even suggested that if the Jehovah's Witnesses would desist he would recommend to the management that the petition and letter be forwarded to the tenants by mail, but the suggestion was rejected (R. 861-62).

This flagrant violation of the rights of respondent and its tenants is, in itself, evidence of the lengths to which petitioners believe themselves entitled to go in order to serve their interests. Taken in utter disregard of the rights of others, it failed entirely of its purpose to discredit in any way respondent's poll.

Summary of Argument.

POINT I.

The prohibitions of the First and Fourteenth Amendments to the Constitution relating to the freedoms of speech, press and worship are not applicable to this controversy.

The discussion which follows under this point will be devoted to a question which the Court of Appeals referred to, but did not decide (R. 1029): Do the First and Fourteenth Amendments "have anything to do with rules made

by any dwelling proprietors, governing conduct inside their edifices"? There are two aspects to this question: (a) Do those Amendments apply directly to the activities of a private person such as respondent? and (b) If not, are they to be applied to the judgment of the courts below?

A. The First and Fourteenth Amendments are limitations upon the exercise of governmental power. They are inapplicable to the acts of private persons.

This Court has recently reaffirmed in *Shelley* v. *Kraemer*[1], the principle that the prohibitions of the First and Fourteenth Amendments are restraints directly upon the Federal and State governments, and not upon the action of private persons, saying:

> "Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[2]

It will be considered *infra* whether the action of respondent is "discriminatory or wrongful". Here it is sufficient to point out that, whatever the nature or purpose of the action claimed to abridge constitutional rights, such action lies beyond the reach of the First and Fourteenth Amendments if it be that of a private person.

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[1] U. S. , 92 L. ed. 845 (16 Adv. Ops. 1948).

[2] 92 L. ed. (Adv. Op.) at 851-52; to the same effect, *Corrigan* v. *Buckley*, 271 U. S. 323 (1926); *Hodges* v. *U. S.*, 203 U. S. 1 (1906); *U. S.* v. *Harris*, 106 U. S. 629 (1883); *U. S.* v. *Cruikshank*, 92 U. S. 542 (1876).

There is no dispute here as to the status of respondent as a private person, or as to the fact that its regulation is not a municipal ordinance (Petition, p. 3). Such were the findings of the state courts (R. 988, 996, 1026, 1028).

While petitioners do not appear to dispute these findings, they attack them obliquely by insisting that the regulation and respondent's action in conditionally excluding Jehovah's Witnesses from the Parkchester buildings must be considered under principles of law which have hitherto been confined to review of governmental enforcement of state or municipal legislative action. Nowhere is the basis for this contention clearly set forth—unless in the argument, the error of which has already been demonstrated (*supra*, pp. 4-5), that the Court of Appeals decided the cases upon these principles and that this Court is obliged to follow suit.

Further evidence of this indirect attack upon the state court findings appears in the care with which petitioners have devised their argument to give the recurring impression that this case involves the application of governmental power to petitioners. Thus they claim (1) that Parkchester was authorized by and Metropolitan operates it by virtue of a "special enactment" of the New York legislature (Laws of 1938, ch. 25; Petition, p. 10, n. 2), (2) that Parkchester is a "community" (Petition, pp. 10-11, 17, 28, 34, 44-45) and (3) that the Parkchester Protective Division excluded Jehovah's Witnesses from the apartment buildings and "falsely arrested" them, "forcibly evicted" them from the interior passageways, and "deported them from the community" (Petition, pp. 5, 6, 12-14, 17, 40-42).

It is obvious from a reading of this "special enactment" that no governmental powers were conferred upon Metropolitan by Chapter 25 of the Laws of 1938 (New York

Insurance Law, sec. 84). This law, enacted to aid in relieving an emergency shortage of rental housing for persons of low and moderate income, was merely a *pro tanto* relaxation of certain restraints imposed by the state upon the investments of all life insurance corporations in New York State. It was not for the individual benefit of Metropolitan as petitioners would have the Court believe. In order to induce insurance companies to invest their private funds in such housing and to make the relaxation effective as a practical matter, the law provides that, after making the investment, the life insurance corporation shall "own, maintain, manage, collect and receive income from, sell or convey the land so purchased and the improvements thereon". None of the state's police power was thereby conferred upon those companies which invested their funds in such housing projects. Their powers of regulation are derived solely from their ownership and possession of the land and buildings and from their lease agreements with their tenants.

Nor can the existence of any governmental status be deduced from the amorphous label "community" by which petitioners invariably refer to Parkchester[3] (Petition, pp. 10-11, 17, 34, 44-45). The label implies no legal rights or duties and is here of no significance. Parkchester is not a "company town" or a village with the characteristics of a typical American town and no question is here presented with respect to "community" streets, sidewalks or other public or quasi-public places (R. 1028) as to which an invitation to the public might be implied from their "community" nature (*cf. Marsh* v. *Alabama,* 326 U. S. 501 [1946]; *Tucker* v. *Texas,* 326 U. S. 517 [1946]).

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[3] *Cf. Matter of Murray* v. *LaGuardia,* 291 N. Y. 320 (1943).

As to petitioners' third claim, respondent does not admit (*cf.* Petition, p. 41), nor does the record support, their assertions of "false arrest", "forcible eviction" and "physical and forcible deportations from the community" (R. 442-45, 447-48, 453-57, 462, 475-76, 497, 768-80, 853-61, 871-75). In view of the express concession by their counsel at the trial that petitioners neither alleged nor contended that physical force ever was used (R. 780), they scarcely can urge this contention now.

Their entries were civil trespasses, as the state courts found (R. 57, 1025-26). Metropolitan had the right of every owner in possession of private property to employ self-help to exclude those trespassers from its property as a civil matter[4] and its exclusions of Jehovah's Witnesses were not criminal arrests[5]. In so excluding them, it was acting only as a private property owner in its own and its tenants' interests, not as an instrumentality of the state or under color of state law or authority.

This is not a case where petitioners are being deprived of any constitutional rights through the operation or exercise of any governmental power. No true comparison can be drawn between a municipal government in its public functions and Metropolitan in its private function—the ownership and management of Parkchester. No true comparison exists between a municipal ordinance, a public act directly involving criminal punishment, and the private regulation of Parkchester which has no criminal sanctions. Neither respondent's regulation nor its enforcement thereof falls within the principles of constitutional law applicable to the review of governmental enforcement of municipal ordinances.

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[4] 1 RESTATEMENT, TORTS, secs. 77-78.

[5] *Cf.* NEW YORK CODE OF CRIMINAL PROCEDURE, sec. 185.

B. The judgment of the state courts did not constitute state action cognizable under the Constitution and did not convert the regulation or any of respondent's actions into acts of the state.

In the state courts petitioners argued that Parkchester is a "quasi-municipality" and that, accordingly, respondent in its operation of Parkchester is subject to the First and Fourteenth Amendments. That argument now has been abandoned in favor of the contention, based on *Shelley* v. *Kraemer*[6], and *Hurd* v. *Hodge*[7], that the judgment of the state courts constitutes state action subject to review by this Court under the First and Fourteenth Amendments. It becomes important, therefore, to examine what the state courts did in this judgment.

The form of the action brought by petitioners was (1) for a declaratory judgment that they have a constitutional right to call from door to door within respondent's apartment houses, that in so doing they were not trespassers and that the regulation as applied to Jehovah's Witnesses is invalid and void, and (2) for an injunction against respondent to prevent its interference with the exercise of their alleged constitutional right (R. 26-27). Respondent's answer was a general denial of the complaint, coupled with the prayer that the complaint be dismissed (R. 29-36).

On the trial of the action, respondent asked and was granted leave to amend its answer (R. 756). The effect of this amendment was that, in addition to the prayer for dismissal of the complaint, respondent joined in petitioners' request that the rights of the parties be declared by the court. This was proper under the state practice, which permits a defendant against whom a declaratory judgment

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[6] ..... U. S. ....., 92 L. ed. 845 (16 Adv. Ops. 1948).

[7] ..... U. S. ....., 92 L. ed. 857 (16 Adv. Ops. 1948).

is sought to join in the plaintiff's request that the rights of the parties be declared by the court.[8] It did not constitute a counterclaim or a prayer for any coercive relief.

The trial court dismissed the complaint, insofar as it sought an injunction, and declared the rights of the parties. Evidently because the judgment included this declaration, in addition to dismissing the complaint, petitioners now contend that it represents action of the State of New York, cognizable under the First and Fourteenth Amendments under the doctrine of *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*.

The *Shelley* case and its companion case, *McGhee* v. *Sipes*, dealt with the validity of injunctive judicial enforcement by state courts of restrictive covenants against the lease, sale or transfer of property to, or occupancy by, non-Caucasians. In those cases Negroes were willing purchasers, from owners who were willing sellers, of properties upon which the Negroes desired to establish homes. Adjoining owners brought suit in the state courts to enjoin the Negro purchasers from occupying the properties in alleged violation of the restrictive covenants. In the *Shelley* case, although the Shelleys were occupying the property in question, the decree of the state court forbade their taking possession of it and divested title from them. In the *McGhee* case the purchasers were directed by the state court to remove from the property and were enjoined from using or occupying the premises in the future.

This Court reversed the judgments of the state courts. It held that, although the private restrictive covenants did not violate any rights guaranteed to the purchasers by the Fourteenth Amendment, such judicial enforcement of the covenants by the state courts was state action which denied

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[8] *Strobe* v. *Netherland Co.*, 245 App. Div. 573 (4th Dep't 1935).

the purchasers equal protection of the laws contrary to the Fourteenth Amendment.

Hurd v. *Hodge* involved the validity of injunctive judicial enforcement of a similar restrictive covenant by the *federal* courts. It was decided as a matter of federal public policy and under a federal statute (R. S. §1978, 8 U. S. C. §42). Though cited by petitioners, it adds nothing to this discussion.

These cases do not hold, as petitioners seem to contend, that every judgment of a state court in a non-constitutional controversy between private persons automatically converts that controversy into a constitutional one between the state and the loser. They were cases in which the plaintiffs successfully invoked the powers of the state courts in support of their claims to enforce restrictive covenants applicable only to non-Caucasians. There the state courts, "supported by the full panoply of state power," actively intervened where, except for that intervention, the purchasers would have been free to occupy the property without restraint.[9]

Here it was petitioners who invoked the judicial powers of the New York court when they attacked a regulation not directed to any particular group, religious or otherwise, and sought to compel respondent by injunction to suffer the entries of Jehovah's Witnesses upon its property. It was petitioners who sought to impose "the full coercive power of the government"[10] not only upon respondent but also upon the 11,000 Parkchester tenants who had individually stated their unwillingness that their privacy should be invaded by Jehovah's Witnesses.

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[9] *Shelley* v. *Kraemer, supra*, at 854-55.

[10] *Id.* at 855.

The state court's injunction in the *Shelley* case was a coercive restraint imposed by the state to deny to the Negro purchaser, on the grounds of race or color alone, the enjoyment of property rights in premises which he had acquired from a willing grantor. In the instant case the declaratory judgment is not founded in any element of discrimination, and does not deprive petitioners of equal protection of the laws. It deals solely with respondent's regulation and its application to the activities of canvassers and solicitors within respondent's apartment houses, without regard to the nature of the canvassers' business or their race, creed or color.

In its declaratory provisions as well as in its dismissal of petitioners' complaint, the judgment in this action has the force of a final judgment and, with respect to the issues presented, considered and determined by the trial court, is *res judicata*.[11] That is true of the final judgment in every civil action. Finality of a judicial determination alone cannot be the test of the applicability of constitutional principles in a civil action. If it were, the Fourteenth Amendment would apply in this case even if there were no declaratory provisions in the judgment. In dismissing petitioners' complaint the trial court necessarily passed upon and determined the identical issues which were presented by the application for a declaration of the jural relations of the parties. The finality of the judgment and its effect as *res judicata* are not determinative of whether the judgment is state action cognizable under the Fourteenth Amendment.

What petitioners are now asserting is that any judgment in this action except one favorable to them deprives them

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[11] New York Civil Practice Act, sec. 473; 5 Carmody's N. Y. Practice (2d ed. 1933), sec. 1974.

of freedom of speech, press and worship without due process of law and is state action prohibited by the Fourteenth Amendment. This reduces to the contention that the Fourteenth Amendment is not only a prohibition against state action of a particular character, but also a mandate to the state to compel all private persons within its jurisdiction to conform to constitutional standards in their private conduct and relationships with other private persons. In view of the adherence of this Court in *Shelley* v. *Kraemer, supra,* to the principle enunciated in the *Civil Rights Cases,* such is not and never has been the law; the unbroken line of authority is to the direct contrary (*supra,* p. 21).

Summary: Neither Metropolitan nor Parkchester is an instrumentality of the State of New York; none of respondent's acts partook of or were under color of state law or authority; the Parkchester regulation was a private expression of Metropolitan's policy as a landlord; and the declaratory judgment in this action is immune from attack under the Fourteenth Amendment. If, indeed, any invasion of petitioners' rights and those of other Jehovah's Witnesses took place—a question to be examined in the following Point—it was "individual invasion of individual rights" which is not the subject of the Fourteenth Amendment.[12] It is submitted that for this reason alone, this Court should deny the petition for a writ of certiorari.

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[12] See *Civil Rights Cases,* 109 U. S. 3, 11 (1883). See also CURTIS, LIONS UNDER THE THRONE (1947), 257.

POINT II.

The decisions in *Marsh* v. *Alabama* and *Tucker* v. *Texas* are not inconsistent with the judgment below. The action of Metropolitan in conditionally excluding Jehovah's Witnesses from the interior passageways of its apartment houses does not violate any of their legal rights.

Petitioners assert (Petition, pp. 2, 16-17, 21) that the decision of the New York Court of Appeals—which they label "alien doctrine" (Petition, p. 20)—is in direct conflict with this Court's holdings in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), and *Tucker* v. *Texas,* 326 U. S. 517 (1946). The opinion of the Court of Appeals gave careful consideration to these cases and concluded that their holdings do not "go nearly so far as appellants would have us go here" (R. 1028).

The *Marsh* and *Tucker* cases presented the question whether a state, consistently with the First and Fourteenth Amendments, could impose criminal punishment on a person who undertook to use the streets and sidewalks of a privately-owned town contrary to the wishes of the owners for the purpose of distributing theological tracts.[13] In each a Jehovah's Witness was convicted for violation of a state trespass statute. As a necessary consequence, a constitutional question was raised as to the limitations imposed by the First and Fourteenth Amendments on the power of the *state.*

This Court reversed the convictions in both cases. It did not question the state court determinations that the

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[13] 326 U. S. at 502.

streets and sidewalks of those privately-owned towns were not "dedicated", but pointed out in the *Marsh* case that the determination as to "dedication" meant merely "that the corporation could, if it so desired, entirely close the sidewalk and the town to the public."[14] It decided that where "the town and its shopping district are accessible to and freely used by the public in general", a Jehovah's Witness was privileged to go upon a sidewalk of that town to distribute religious literature. The foundation of this holding was the principle that the rights of an owner in his property become increasingly circumscribed to the extent that the owner "for his advantage opens up his property for use by the public in general",[15] a principle which the Court illustrated by decisions under the commerce clause that the rights of private owners of bridges, ferries, turnpikes and railroads must yield to the public interest where general public use of them has been invited.

In the *Marsh* and *Tucker* cases, the Court found that the owners of those towns had so submitted their privately-owned streets and sidewalks to use by the general public as to constitute, as a matter of fact, *pro tempore* dedication of them to the public, a dedication which could not be revoked as to any specific members of the public except by exclusion of the public generally. From this it would appear that the Jehovah's Witnesses had infringed no property rights of the owners by going upon the streets and sidewalks and using them for distribution of religious literature, even against the prohibitions of the owners. In such circumstances, the Court held that application of the states' "trespass after warning" statutes to their activities violated the prohibitions of the Fourteenth Amendment.

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[14] 326 U. S. at 505.

[15] 326 U. S. at 506.

Implicit within this determination are echoes of the Court observing in *Hague* v. *C. I. O.*[16]:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

And in *Schneider* v. *Irvington*[17]:

> "• • • the streets are *natural and proper places* for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in *appropriate places* abridged on the plea that it may be exercised in some other place." (Emphasis added.)

This traditional principle was recognized in *Marsh* and *Tucker* where this Court decided that streets and sidewalks which have been left open to general public use constitute, not only ways for travel, but also, by ancient and immemorial use and custom, public forums of discussion and channels of communication. Whoever comes upon them for those purposes, while they remain open to use by the public with the owner's consent, does so in his own right. Consequently, the statutes of Alabama and Texas, as applied in the *Marsh* and *Tucker* cases, constituted deprivations of Jehovah's Witnesses' freedoms of press and worship only

[16] 307 U. S. 496, 515 (1939). This language was recently reaffirmed in *Saia* v. *New York*, ... U. S. ....., 92 L. ed. 1087, 1090 (18 Adv. Ops. 1948). A similar idea is expressed in *Jamison* v. *Texas*, 318 U. S. 413, 416 (1943) and in *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940).

[17] 308 U. S. 147, 163 (1939). See also *Prince* v. *Massachusetts*, 321 U. S. 158, 174 (1944) (dissent); *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942); *Thornhill* v. *Alabama*, 310 U. S. 88, 106 (1940).

because those statutes made criminal the orderly conduct of their activities at places where they had a complete right to be, as against the wishes of the owners, because of the public nature of those places and the public use to which the owners had submitted them.

Petitioners insist that the *Tucker* case, unlike the *Marsh* case, involved a prohibition of house-to-house distribution, rather than a prohibition of distribution on the streets and sidewalks (Petition, pp. 21-22). But the Court said in the *Tucker* decision (326 U. S. at 520):

> "The only difference between this case and *Marsh* v. *Alabama* is that here instead of a private corporation, the Federal Government owns and operates the village. This difference does not affect the result. Certainly neither Congress nor Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment."

Examination of the record in the *Tucker* case shows beyond question that, disregarding the governmental character of the landlord, the two cases are substantially alike. From that record (fols. 24-26, 34-35) it appears that, under leases from the Federal Public Housing Authority, the tenants had exclusive possession, not only of the houses, but also of the surrounding plots and paths abutting on the streets and sidewalks of the village. No landlord-tenant agreement was shown limiting the general property rights of the tenants in those areas. The boundary of the tenants' exclusive property—the doors of the apartments in the instant case—was located where those plots abutted on the sidewalks. The Authority was without right to exclude anyone from those plots or houses.[18] The only property in

[18] 1 RESTATEMENT, TORTS, sec. 162.

the village over which it had any right of exclusion was the streets and sidewalks. Thus both the *Marsh* and *Tucker* cases were decided by an identical process of reasoning, to the effect that so long as the streets and sidewalks were left open by the owner for use by the public in general, a temporary easement existed in favor of all members of the public.

In the instant case, although Metropolitan owns and controls streets and sidewalks which are marked "Private Street" (R. 263-67, 273) it has never sought to limit in any way the activities of Jehovah's Witnesses on those streets and sidewalks (R. 1028). It has sought merely to limit indiscriminate canvassing within each apartment house.

The common passageways, stairways and elevators in Metropolitan's apartment houses have never been thrown open to the public, are not places of assembly, and have never been considered as public forums for debate of current questions, channels of public communication or places for canvassing or solicitation. The record is devoid of any evidence that the owner of Parkchester ' for his advantage opens up his property [the interior passageways of the Parkchester buildings] for use by the public in general" (326 U. S. at 506). Hence, they cannot be deemed "appropriate places"[19] for such activities. Finally, unlike the owners of the towns in the *Marsh* and *Tucker* cases, Metropolitan has assiduously respected the right of each tenant to receive such canvassers and solicitors as the tenant may desire. Neither the *Marsh* nor the *Tucker* case is like the instant case and neither is controlling here; both are entirely consistent with the judgment below.

The action of Metropolitan in conditionally excluding Jehovah's Witnesses is in harmony with the existing au-

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[19] *Schneider* v. *Irvington*, 308 U. S. 147, 163 (1939).

thorities. On this question *Martin* v. *Struthers,* 319 U. S. 141 (1943), is pertinent. The decision in that case contains many signposts which have been followed by Metropolitan in the instant case and which point a way out of the difficult social problems inevitably arising from the intrusion of Jehovah's Witnesses.

The city of Struthers, Ohio, passed an ordinance absolutely prohibiting any person engaged in distributing handbills, circulars and other advertising matter, from ringing the doorbell or otherwise summoning the inmate of any residence to the door for the purpose of receiving such handbills, circulars or other advertising material. Thelma Martin, a Jehovah's Witness, was arrested and convicted for violation of the ordinance. On appeal, this Court reversed.

The majority opinion declared that the question whether door-to-door canvassing shall be permitted "has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community". The Court found that the ordinance controlled nothing but the distribution of literature and that it subjected the distributer to criminal punishment for annoying a person upon whom he called, even though such person in fact might be glad to receive the literature. Balancing the asserted civil rights of Jehovah's Witnesses and the rights of the householder to receive the literature against the interest of the municipality which, by the ordinance, sought to protect the interests of its citizens whether the particular citizen wanted that protection or not, the Court held the ordinance to be an unconstitutional exercise of police power. It pointed out, however (pp. 147-8):

> "Traditionally the American law punishes persons who enter onto the property of another after

> having been warned by the owner to keep off. • • • The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home."

It appears from the *Martin* case that while the constitutional rights of Jehovah's Witnesses may survive a municipal ordinance which operates as a blanket exclusion order, those rights must yield to the contrary wishes of the person in possession, for if he states his unwillingness to receive them, Jehovah's Witnesses have no right to enter upon his property to seek to make him listen.

While respondent has not placed signs at the doors of its buildings warning canvassers and solicitors to keep off, the effect in the case of Jehovah's Witnesses is exactly as if such signs were there. They have been given notice, both orally and in writing, to desist from canvassing within the buildings (Petition, pp. 12-14). In addition, the unwillingness of the tenants to be disturbed by Jehovah's Witnesses was overwhelmingly expressed in the results of the impartial poll conducted by Metropolitan among

its tenants (R. 317-30, 847-50, 1024-25). It is of significance that this poll was not a "determination of the community" whether any tenant might receive Jehovah's Witnesses. Each response registered "the will of the individual master of each household" with respect only to visits of Jehovah's Witnesses in *his* apartment (R. 979-85; Def. Exs. G through N). Except for a handful of tenants who stated their willingness to receive them, the effect was as if the tenants had posted "Do Not Disturb" signs on their apartment doors. As to those who stated a willingness for Jehovah's Witnesses to visit them in their apartments, Metropolitan not only furnished their names to the Society, but also offered its services in facilitating such visits (R. 981-82, 985, Def. Exs. K and N).

In the last analysis, the authorities upon which petitioners rely to establish "constitutional rights" were founded in two basic considerations: (1) Were Jehovah's Witnesses conducting their activities in an *appropriate place?*[20] and (2) Regardless of the appropriateness of the place, was the prohibition of their practices imposed by an *appropriate agency?*

For reasons of public safety, peace and protection from fraudulent solicitations, state and municipal governments, in some instances, have adopted statutes and ordinances prohibiting solicitors, peddlers, canvassers, etc. from *all* places within the limits of a municipality unless licensed to enter by an administrative officer endowed with absolute discretion to admit or exclude them.[21]

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[20] As Mr. Justice Black noted in *Martin* v. *Struthers, supra,* at p. 143 "No one supposes, for example * * * that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities."

[21] *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).

In others, similar prohibitions, enacted for similar reasons, have been limited to restricting their use of the public streets, sidewalks and parks within the municipal limits.[22]

In these situations, this Court has held that streets, sidewalks and parks which have been left open to general public use, have immemorially been considered *peculiarly appropriate places* for the interchange of ideas; and that, consequently, enactments of state or municipal governments potentially restrictive of the exercise of speech, press and religious expression *in such places* violate the Fourteenth Amendment. Governmental restraints upon such activities in such manifestly appropriate places can be justified only by proof that they are so conducted as to create a clear and present danger of riot or disorder,[23] or interference with traffic upon the public streets[24] or other immediate threat to public safety, peace or order.[25]

No court has ever held that the privately-owned land between a public street and the front door of a private individual dwelling is an inherently appropriate place for the conduct of the Witnesses' activities contrary to the wishes of the owner. In some cases, however, municipal governments have absolutely prohibited Jehovah's Witnesses' house-to-house activities within the municipal limits without regard to the election of the individual private owner to admit or exclude them from his property, or they have enacted taxing and discretionary licensing ordinances potentially capable of accomplishing the same re-

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[22] *Saia* v. *New York*, ... U. S. ...., 92 L. ed. 1087 (18 Adv. Ops. 1948); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *cf. Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[23] *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

[24] *Cox* v. *New Hampshire*, 312 U. S. 569 (1941).

[25] *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

sult.[26] All these were held unconstitutional infringements of Jehovah's Witnesses' freedom of speech, press and religion.

Fundamental to this line of decisions was the Court's recognition of the traditional principle of law that admittance or exclusion of strangers from his property in the first instance is the prerogative of the possessory owner for the time being, not that of the state or municipal government. Until the owners or possessors of those places have prohibited the Witnesses' entries upon them, a state or municipal government is an *inappropriate agency* to prohibit or burden their use of such places for dissemination of ideas. The only *appropriate agency* of prohibition is the possessory owner. But if, for example, a Jehovah's Witness were to disregard the warning of a householder to keep away from his door the state or municipality might then become, at the owner's request, the appropriate agency to enforce that prohibition.

Summary: The instant action presents circumstances not heretofore before this Court. Neither historically nor by any extension of realities can the interior common passageways of a Parkchester apartment house be deemed, by their nature, appropriate market places of ideas. Those spaces never have been submitted to general public use (R. 998-99, 1028). They are Metropolitan's strictly private property for use only by Metropolitan, the tenants and the *bona fide* invitees of the tenants. Here also, not only because of its possessory ownership of those spaces, but also

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[26] *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Douglas* v. *Jeannette*, 319 U. S. 157 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *Irvington, supra; cf. Tucker* v. *Texas*, 326 U. S. 517 (1946).

because of the nature of the relationship between landlord and tenants in matters affecting their safety, peace, quiet, comfort and convenience within an apartment house, Metropolitan is an eminently appropriate agency to regulate or restrict the use of those inner hallways by Jehovah's Witnesses and other uninvited, indiscriminate door-to-door callers for their self-serving, annoying and potentially dangerous activities. Here the prohibition is conditional, not complete. If the tenants wish to receive Jehovah's Witnesses, they are perfectly free to have them enter.

In sum, under the principles which have emerged from decisions of this Court in these various Jehovah's Witnesses cases, no legal right of petitioners is curtailed by their conditional exclusion from the interior hallways of apartment buildings (inappropriate places for their activities) by respondent (an appropriate agency). The petition should be denied.

POINT III.

Metropolitan's regulation, as applied here to Jehovah's Witnesses, is authorized by law and by its leases with the Parkchester tenants. It is reasonable and has been reasonably applied.

The factual situation presented in this case is unparalleled by any heretofore before this Court. Jehovah's Witnesses now ask the Court to review this case and to declare that they have the absolute right, defeasible by no one, to go through private apartment houses at will, and as often as they wish, even though (a) the owner has told them to keep out, (b) the tenants upon whom they wish to call have declined to receive them and (c) they are strangers in law and in fact to both landlord and tenants.

Respondent privately owns, operates and maintains all the Parkchester buildings (R. 988, 1023; Petition, p. 10). It is not an absentee landlord, but has retained possession of all parts of those buildings except the apartment space expressly granted to its tenants by leases (R. 36-51, 271, 764-67). Unquestionably it is the possessory owner of all the entrances, hallways, stairways and other common passageways within the buildings, subject only to the tenants' rights of ingress and egress. Incidental to its possessory ownership, supervision and control of those common passageways, it has the right to admit or exclude whomever it chooses, subject only to the rights of the tenants as expressed in the lease agreements[27].

The right petitioners assert is not derived from any express invitation; only one such invitation from a tenant was shown at the trial (R. 580-81). Nor have they any implied invitation. The state courts so found (R. 998-99, 1026, 1028; *cf.* Petition, pp. 24-28). Petitioners insist, however, that the regulation is unauthorized and unreasonable (Petition, pp. 22-28, 32-36).

Paragraph Fourth of the standard form of Parkchester apartment lease (R. 36-51) provides (R. 38-39):

> "The Tenant shall observe and comply with and the Tenants agree that all persons dwelling in or visiting in the demised premises shall observe and comply with the rules and regulations printed on the back hereof, and such other and further rules and regulations as the Landlord may from time to to time deem needful and prescribe for the safety, care and cleanliness of the building, and the preservation of good order therein, as well as the comfort,

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[27] Cooley, Torts (4th ed. 1932), secs. 247-52; see also Holmes, The Common Law (1881), 206-46; 1 Restatement, Torts, secs. 158, 163, 164; 3 Bl. Comm.* 209.

quiet and convenience of other occupants of the building."

Number 15 of the Rules and Regulations printed on the back of the lease, and thus made part of it, further provides (R. 51):

> "15. The Landlord reserves the right to rescind or change any of the foregoing rules and to make such other rules and regulations from time to time as may be deemed needful for the safety, care and cleanliness of the premises and for securing the comfort and convenience of all the Tenants."

Pursuant to this lease authority, Metropolitan prescribed the regulation which embodies Metropolitan's policy of excluding from the common passageways of the Parkchester buildings callers, not specifically invited by the tenants, who go indiscriminately from door to door of the tenants' apartments (R. 19-20, 277-78, 1023-24). The courts below have found that the regulation is authorized by the lease, serves the purposes specified by the lease without undue or onerous burden, and is reasonable (R. 55-57, 996, 1001, 1025-26, 1029). In the words of the trial court (R. 996):

> "The regulation here attacked is a private one adopted by defendant in its capacity as the landlord of the Parkchester apartment houses. It is designed to increase the safety, care and cleanliness of the houses, to preserve good order therein and to promote the comfort, quiet and convenience of their occupants. The right to prescribe it was given to defendant by the provisions of its written leases with its tenants, hereinabove quoted."

Likewise the New York Court of Appeals explicitly stated (R. 1029):

> "We hold that this sort of regulation, as here written and applied to plaintiffs, was not unreasonable."

Because of its size and the concentration of a large number of persons in a relatively small area, Parkchester offers a unique attraction to all types of persons, well intentioned or otherwise, who want to canvass the tenants or solicit charitable or other contributions from individual residents. It affords a tempting target for the salesman, mendicant or colporteur interested in achieving maximum coverage at a minimum of effort and time. If a rigorous policy against such canvassing were not adopted, the residents of Parkchester would be subjected to a steady stream of callers which could not be adequately controlled by the five to ten guards who are on duty at any one time (R. 766-67). As the testimony shows, the uninvited caller creates a constant problem, despite the activities of the Protective Division (R. 281-91, 768-71, 781, 797-98).

The regulation designed to cope with this problem applies only to a limited class of persons, canvassers and solicitors, whose presence is annoying when the entry is only occasional and most exasperating when frequent and persistent. It applies to persons who are usually transients (as special pioneers, petitioners here, are) and who may or may not be what they seem. The places within which their activities are inhibited are narrowly defined. Of all of the Parkchester area, consisting of apartment buildings, commercial space, streets, sidewalks and parks, they are conditionally excluded only from the interiors of the residential buildings.

Nor is the regulation concerned with the subject matter of their communications to the tenants. It does not involve censorship by respondent nor does it absolutely prohibit

dissemination of information. It is a reasonable regulation of activities within a particular place.

No absolute bar to visits by canvassers and solicitors upon the Parkchester tenants is imposed by the regulation. Whenever a tenant, desiring to receive their visits, expresses that desire, they are free to call upon him (R. 1028). The only activities inhibited by respondent are uninvited, indiscriminate calling from door to door. The requirement that canvassers obtain permission from Parkchester's management or exhibit a written invitation from a tenant before visiting that tenant, fulfills the intent and purpose of Metropolitan and its tenants, expressed in the lease, of making Parkchester a safe, quiet and comfortable residential area. This is the only practical identification device by which the interests of all—respondent, its tenants and the canvassers—can be preserved within that intent and purpose.

Unlike the owner of an individual home who, as a result of the greater spaces between individual houses, can himself control all annoying disturbances except those of such enormity as to be breaches of the peace which the police will put down, the apartment house dweller must and does look to his landlord as the most effective and appropriate means of securing him from unwanted intrusions upon his privacy. The Parkchester tenants are no exception and "open house" to canvassers will prejudice Metropolitan's relationships with its tenants.

While individual Jehovah's Witnesses may conceive themselves as carrying out fundamental scriptural duties by calling upon Parkchester residents and some may have no commercial objectives, the disturbing effect of their door-to-door activity upon the quiet, comfort and convenience of all tenants, is at least as great as that of the commercial canvasser.

Though at first visits by Jehovah's Witnesses were few in number, complaints began to be made by the tenants to the management and the complaints mounted in frequency and intensity as the number of visits by the Witnesses increased (R. 771, 775, 776, 777). The tenants were annoyed, and they soon made their annoyance felt because they expected Metropolitan to put a stop to the visits. At the time of the mass invasion of Jehovah's Witnesses on April 28, 1946, this annoyance was so evidenced by the numerous complaints from the tenants that it was necessary to add two telephone operators to handle calls (R. 779-80).

In brief, the right of a landlord to exclude strangers from his property and of a tenant to be free from intrusions upon his privacy is the same when asserted at Parkchester as when asserted with respect to a single apartment house, hotel or rooming house. Every individual tenant at Parkchester has the same right to be free from annoying callers as any other apartment dweller. And Metropolitan is as much entitled to protest the burdening of the hallways of its buildings with an easement in favor of Jehovah's Witnesses as is the individual owner of the most modest multiple dwelling. Here the record is ample and persuasive that the regulation is necessary and desirable in the proper and orderly operation of Parkchester and has been reasonably applied to petitioners.

POINT IV.

The regulation has been enforced without discrimination.

With studied deflection of emphasis, petitioners assert (Petition, p. 12) that "no concerted effort was made by respondent effectively to enforce the regulation by eviction

of callers from the buildings or deportation from the community over the course of the years except as to Jehovah's Witnesses". That assertion misstates the facts shown by the evidence in this case. The record establishes that, in the instances which came to the attention of the Parkchester management, the regulation was enforced, the canvassers and solicitors were requested to leave, and, with the exception of Jehovah's Witnesses, the request was observed (R. 286, 287-88, 290-91, 768-71, 781). They so little observed the request that, they claim, they made two complete canvasses of the buildings through the use of the so-called "special Parkchester technique" and a third complete canvass through mass invasion (*supra*, pp. 11-12, 16-18).

In a fruitless effort to demonstrate that discrimination was practiced against them (Petition, pp. 37-38), petitioners called as witnesses upon the trial a few tenants who testified to isolated instances of visits from various religious and philanthropic organizations. There was no evidence that Metropolitan knew of these instances, for the tenants uniformly testified that they were not annoyed by these visits and did not complain to the Parkchester management (R. 356-57, 365, 371). Since less than ten of the guards are on duty at one time, in the whole area of Parkchester (R. 766-67), the management is forced to rely in large measure upon telephone complaints from its tenants to learn that canvassers are at work in the apartment buildings.

Admittedly, the no-canvassing policy was relaxed during the war years when various organizations affiliated with the Civilian Defense Volunteer Organization requested permission to make door-to-door canvasses (R. 283, 286-87, 771, 794-96). These were carried forward as a rule by Parkchester's patriotic tenants, with committee heads selected

from among their numbers, on behalf of such nonsectarian public causes as war bond drives, Red Cross and U. S. O. (R. 286, 289-90, 794). Under these special circumstances, permission by Metropolitan to its tenants and representatives of the Civilian Defense Volunteer Organization to go from door to door for purposes directly related to the war effort constituted no discrimination against Jehovah's Witnesses and any others respondent sought to exclude. Certainly, Jehovah's Witnesses could not qualify, and made no effort during the war to qualify, for any purpose related to the defense of this country.[28]

With that single exception, every effort has been made to enforce the letter and spirit of the regulation, and it has been brought to bear not only upon Jehovah's Witnesses but upon all who attempted to go from door to door. There has been no discrimination against Jehovah's Witnesses and they have not been denied equal protection.

Conclusion.

This is not a case, like so many that hitherto have come before this Court, where Jehovah's Witnesses have been the victims of oppression and persecution and the full power of the state or municipality has been arrayed against them. Here they have taken the offensive. Denying that their alleged rights can ever be subordinated either to the rights of property owners or to the desires of their harassed listeners to be left alone, they now seek to enlist the aid of the state to force open the doors of every apartment house against the will of its owner.

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[28] See *Falbo* v. *U. S.*, 320 U. S. 549 (1944).

Throughout this litigation respondent has asked petitioners to state whether there are any areas in which they do not conceive themselves to be entitled, by constitutional right as well as divine mandate, to carry out their activities. If petitioners were to answer this question—which they have so far declined to do—in the only way consistent with their beliefs and objectives, their answer would reveal to this Court the novel and dangerous implications of the claim here asserted.

It is important to emphasize that what petitioners here ask of this Court is not freedom of belief, but absolute freedom to act as their beliefs dictate.[29]

The most casual student of this militant sect will soon observe that they are no respecters of the property or rights of others. It is not to be hoped that their own sense of self-restraint will prove an effective curb on their activities. They are working inexorably toward their goal of complete freedom to go wherever their inclinations may lead them, to enter upon private property and to force the unwilling to listen. If they are successful in this action they will have come dangerously close to their goal.

Before this Court grants this petition and agrees to review this case, respondent urgently asks that it ponder well the sociological as well as the legal implications of a reversal of the state courts. If this Court throws open the doors of Parkchester to Jehovah's Witnesses, what doors can thereafter be barred to them? Will any buildings be privileged to turn them away—even rooming houses, hotels, office buildings or apartment houses with doormen? And if these doors are forced open for Jehovah's Witnesses, must

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[29] "Thus the [Fourteenth] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-04 (1940).

they not likewise be opened for others claiming a like status under the guise of freedom of speech, press or religion?

The decisions in *Marsh* and *Tucker* by no means left the private landowner at the mercies of Jehovah's Witnesses. He will become so, however, if this case is reversed, for then the words of the book "Religion" (quoted *supra*, p. 10), likening Jehovah's Witnesses to locusts entering the home, will acquire an uncomfortably real significance.

The petition for writ of certiorari should be denied.

Respectfully submitted,

STUART N. UPDIKE,
Attorney for Respondent.

JAMES W. RODGERS,
JOHN R. SCHOEMER, JR.,
PHILIP T. SEYMOUR,
Of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM 1948

◆

No. 187

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE
and EARL W. HITCH
Petitioners
v.
METROPOLITAN LIFE INSURANCE COMPANY
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW YORK COUNTY
STATE OF NEW YORK

◆

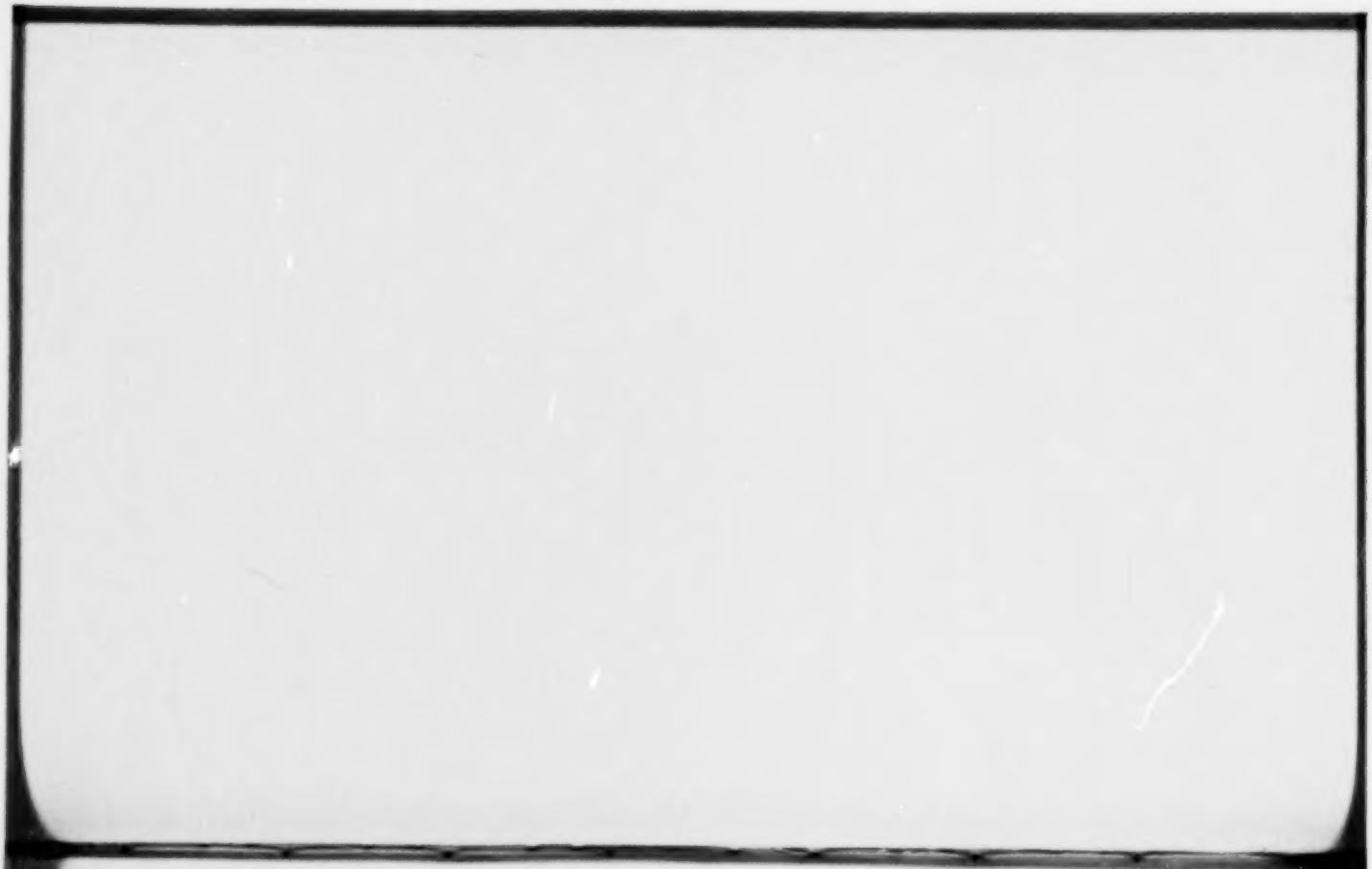
No. 400

DAN LEROY HALL
Appellant
v.
COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE COMMONWEALTH OF VIRGINIA

JOINT PETITION FOR REHEARING

HAYDEN C. COVINGTON
GROVER C. POWELL
Counsel



SUPREME COURT OF THE UNITED STATES

October Term 1948

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No. 187

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.,
GEORGE KELLY, MAURICE L. HARE
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Respondent

On Petition for Writ of Certiorari
to the Supreme Court of New York County
State of New York

◆

No. 400

DAN LEROY HALL
Appellant
v.
COMMONWEALTH OF VIRGINIA

Appeal from the Supreme Court of Appeals
of the Commonwealth of Virginia

JOINT PETITION FOR REHEARING

May it Please the Court:

Now come the petitioners and the appellant in the above causes within the time fixed by order of the Court and

present their joint petition for rehearing. As grounds they show the Court the following:

I

The Court should have granted the petition for writ of certiorari in the exercise of sound discretion upon the grounds stated in the petition.

II

The Court erred in granting the motion to dismiss the appeal because a substantial federal question was presented, as disclosed in the statement as to jurisdiction of this Court.

DISCUSSION

The state action in these cases (judicial interpretation of the common law in the New York case, and of the statute in the Virginia case) approves that type of law which enables a landlord to make a community determination that house-to-house exercise of constitutional rights may be prohibited in an apartment community or housing project.

If the community determination in these cases had been by ordinance the action would have been unconstitutional under the decisions of this Court. (*Martin* v. *Struthers,* 319 U. S. 141. Compare *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573) Door-to-door calls for the purpose of distribution of literature are traditionally a proper exercise of a right guaranteed by the Constitution. (*Schneider* v. *State,* 308 U. S. 147; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141) This Court has held that the operator of a housing project could not treat such door-to-door callers as trespassers in defying the rule of the

manager of the project which forbade such practice. (*Tucker* v. *Texas*, 326 U. S. 517)

It seems quite obvious that there is a direct conflict between the two decisions below and the former decisions of this Court referred to above. If not, then certain it is that there has been such a departure from the principles of such decisions as to present grave and serious questions that should be determined by this Court.

The New York decision has been criticized in a note appearing in 48 COLUMBIA LAW REVIEW 1106-1107, November, 1948. Because the discussion agrees with the position taken here it is quoted in this petition. The writer says:

"Efforts to restrict or control the activities of religious groups by means of statutes or municipal ordinances abridging their right to use the streets have been thwarted by the Supreme Court,[1] except when clearly directed at specific perils to public order[2] or safety.[3] That the streets were the private property of a company town, and the regulation promulgated by individuals in a private capacity, has not been regarded as significant.[4] Similar treatment has been accorded to governmental restrictions on door-to-door canvassing for religious purposes.[5] The Court

[1] "Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938); *cf.* Hague v. CIO, 307 U.S. 496 (1939).

[2] "Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (conviction for use of abusive language in public street upheld).

[3] "Cox v. New Hampshire, 312 U.S. 569 (1941) (requirement of license to hold parade upheld); *cf. In re* Whitmore, 47 N.Y.S. 2d 143 (Dom. Rel. Ct. 1944) (vaccination requirement upheld against challenge on religious grounds).

[4] "Marsh v. Alabama, 326 U.S. 501 (1946); *accord*, Tucker v. Texas, 326 U.S. 517 (1946) (U.S. Govt. agency); *see* Hague v. CIO, 307 U.S. 496, 515 (1939).

[5] "Follett v. Town of McCormick, 321 U.S. 573 (1944); Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943), *vacating* Jones v. City of Opelika, 316 U.S. 584 (1942); Largent v. Texas, 318 U.S. 418 (1943); Schneider v. State, 308 U.S. 147 (1939); *accord*, People v. Barber, 289 N.Y. 378, 46 N.E. 2d 329 (1943).

has indicated that absolute exclusion of the colporteur from private homes may be predicated only upon the individual householder's affirmative expression that he desires it,[6] the theory being that the privilege not to listen is his alone to exercise.[7]

"In the instant case, it apears that the regulation would be unconstitutional if promulgated[8] or enforced[9] by a governmental authority. It is true that precedent is concerned with individual homes and that here apartment dwellings are involved. Physical limitations on urban development, however, have necessitated vertical, rather than horizontal expansion in housing construction, and just as the approach to individual homes is by way of the streets and private walks, so does access to individual apartments require the use of inner hallways.

"Government prohibition of the use of the hallways would be proper if predicated upon the householder's manifestation of a desire to exclude the colporteur.[10] The regulation here sustained, however, places the burden of securing permission to enter upon the plaintiff,[11] a restriction in accord with an earlier state decision,[12] but since disapproved by the Supreme Court.[13]

"If, therefore, there has been such 'state action' as to bring the case within the purview of the Fourteenth Amendment, the plaintiffs may invoke the protection of the Constitution.[14] While the defendant is a private corporation,

[6] "*See* Martin v. Struthers, 319 U.S. 141, 147-48 (1943).

[7] "*See id.* at 143.

[8] "See Note [5] *supra.*

[9] "Tucker v. Texas, 326 U.S. 517 (1946); Marsh v. Alabama, 326 U.S. 501 (1946).

[10] "See Note [6] *supra.*

[11] "Instant case at 348, 79 N.E. 2d at 436.

[12] "People v. Bohnke, 287 N.Y. 154, 38 N.E. 2d 478 (1941).

[13] "*See* Martin v. Struthers, 319 U.S. 141, 148 n. 12 (1943).

[14] "*Cf.* 33 VA. L. REV. 643 (1947); Hale, *Force and the State,* 35 COLUMBIA LAW REVIEW 149, 179, 180, 198-99 (1935).

there are several factors present which may well justify a finding that the action taken is governmental in nature. The defendant, without specific statutory authorization,[15] would not have been able to engage in the construction of housing projects, the public purpose of which has been explicitly recognized by the legislature [16] and the courts.[17] It seems arguable that such an authorization, enabling a private corporation to exercise the functions of a governmental body over a community many times larger than a great number of towns and villages, should carry with it a correlative subjugation to the constitutional limitations which restrict the activities of the latter. Moreover, whatever coercive substance the regulation in this case might contain would depend in the final analysis upon the implicit threat of judicial enforcement. Considering the broad interpretation recently given to the 'state action' principle by the Supreme Court,[18] the cumulative effect of these factors may place the defendant's conduct within the ambit of constitutional limitation.

"This is not to say, however, that defendant is without means to protect its tenants from unwanted intrusions. The apartment dwellers who do not wish to be disturbed in their homes may designate the defendant as agent for the implementation of this desire. Where all tenants have done this, there is no longer a reason for permitting the canvasser to use the inner hallways. But where such tenant action falls short of unanimity, the defendant exceeds its mandate by barring colporteurs from those apartments from which they have not been expressly excluded by the

[15] "N. Y. Ins. Law § 84; *cf.* N. Y. Const. Art. 18 § 1.

[16] "N. Y. Redevelopment Companies Law § 1; N. Y. Ins. Law § 84.

[17] "Matter of Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1943).

[18] "Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948).

tenant, and from the use of the hallways where needed to reach such apartments." (48 COL. L. REV. 1106-1107)

It should be remembered that there was no trespass against the tenants in these cases. The holding that there was an alleged trespass against the landlord who, in each case, made a community determination is unconstitutional because the decision does not leave the determination to each tenant where it belongs. This is contrary to the principle of *Marsh* v. *Alabama,* 326 U. S. 501, and *Martin* v. *Struthers,* 319 U. S. 141.

The rule of the decisions below should not be allowed to stand without review by this Court. The symmetry of the structure of the law pronounced by the Court under the First Amendment in cases involving Jehovah's witnesses has been broken by the holdings. To allow the holdings to pass without discussion now by this Court will only result in future and certain conflicts and confusion in the decisions of the state and federal courts on the question. Note the present holdings conflicting with those of the courts below. (*Woods* v. *Carol Management Corp.,* 168 F. 2d 791 (C. A. 2d); *Massachusetts* v. *Richardson,* 313 Mass. 632, 48 N. E. 2d 678)

The Court should remember that grave questions affecting the civil liberties guaranteed to the people are not settled until this Court has promulgated its solemn decision and the justices of the Court have expressed their opinion. In the cases involving the clash of such rights with the flag salute and license tax laws the refusal to review (*Coleman* v. *City of Griffin,* 302 U. S. 636; *Hering* v. *State Board of Education of State of New Jersey,* 303 U. S. 624; *Gabrielli* v. *Knickerbocker,* 306 U. S. 621; *Bowden* and *Sanders* v. *Fort Smith,* 314 U. S. 651; judgment vacated, 315 U. S. 793, 316 U. S. 584) did not help settle or solve the problems because the boiling controversy continued to wash the problems back to the door of the Court until finally they were considered and the question decided.

(*Lovell* v. *Griffin,* 303 U. S. 444; *Minersville* v. *Gobitis,* 310 U. S. 586, *reversed* in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, probable jurisdiction noted at 317 U. S. 621; *Murdock* v. *Pennsylvania,* certiorari granted at 318 U. S. 748 [See *Jones* v. *Opelika,* 316 U. S. 584, judgment vacated and petition for reargument granted at 318 U. S. 796, opinion at 319 U. S. 103], opinion at 319 U. S. 105; *Martin* v. *Struthers,* appeal dismissed at 317 U. S. 589, judgment vacated and probable jurisdiction noted at 318 U. S. 739, opinion at 319 U. S. 141)

Inasmuch as the activity of Jehovah's witnesses is national, rather than local, and since forty-six percent of all the householders in the United States are tenants (See *Housing Statistics Handbook,* United States Government Printing Office, 1948, page 60) the problem will soon be confronted from some other jurisdiction. The percentage of people who occupy homes as tenants is greater in the cities, where the activity of Jehovah's witnesses is greater, than in the rural sections of the country. New York City is a good example. Only 26.7% of the householders in New York City live in single dwellings; 73.3% are tenants, householders living in multiple dwellings. 35.1% of all the people live in large apartment buildings, built to accommodate more than ten families. See *Housing Statistics Handbook,* page 47, *supra.* A survey of 140 municipalities and municipal districts of the United States reveals that among the 17,217,317 householders only 37.3% own the homes in which they live. See 16th Census of the United States, 1940, *Housing,* Vol. 1, page 37.

It is respectfully submitted that now is the time to consider the problem and decide the issues. The nature of the controversy, the kind of holdings below, the apparent conflict with the decisions of this Court and the departure from principles of the First Amendment should persuade a sufficient number of the justices to join Justices Murphy and Douglas in their vote for review of the cases. See

Jackson, J. in *Hirota* v. *MacArthur*, Nos. 239-240 October 1948 Term, December 6, 1948, 17 LAW WEEK 4043.

WHEREFORE petitioners and appellant pray that the orders of this Court made in these cases December 6, 1948, be vacated and set aside; that, upon consideration of this petition, the writ of certiorari be ordered granted in the New York case and probable jurisdiction be noted in the Virginia case; and that the cases be set down for oral argument and submission upon the substantial federal questions presented.

Respectfully submitted,

HAYDEN C. COVINGTON

GROVER C. POWELL

Counsel

CERTIFICATE

The undersigned counsel for petitioners and appellant hereby certifies that the foregoing joint petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

Counsel

December 24, 1948.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 187.

WATCHTOWER BIBLE AND TRACT SOCIETY, INC., GEORGE KELLY, MAURICE L. HARE and EARL W. HITCH,
Petitioners,

—against—

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

RESPONSE TO PETITION FOR REHEARING.

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THE COURT PRESS, N. Y. C.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 187.

WATCHTOWER BIBLE AND TRACT SOCIETY, INC., GEORGE KELLY, MAURICE L. HARE and EARL W. HITCH,
Petitioners,

—against—

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

RESPONSE TO PETITION FOR REHEARING.

The present petition in this cause meets none of the substantive requirements of Rule 33 of this Court concerning an application for a rehearing. It lacks:

(1) any showing of any "intervening circumstances of substantial or controlling effect" since the filing of the petition for writ of certiorari;

(2) any showing of "other substantial grounds, available to petitioners although not previously presented"; and

(3) a certificate of petitioners' counsel that the petition is restricted to either or both of the grounds specified in (1) and (2) above.

Such complete disregard of Rule 33 cannot be excused as mere irregularity. It goes to the very availability of the remedy to unsuccessful litigants. In Rule 33 the Court has narrowly defined the classes of cases in which petitions for rehearing will be entertained. Petitioners have not even attempted to bring this application within those classes.

I.

If there is any "intervening circumstance" referred to in the petition it is an unsigned article in the Columbia Law Review for November, 1948. In that article—evidently the work of a student editor—some criticism is leveled at the decision below of the New York Court of Appeals. The author concludes the law should be that Jehovah's Witnesses may be excluded from an apartment building only if all of the tenants unanimously and expressly exclude them.

For present purposes it should be sufficient to point out that the theory advanced and the authorities cited in that article were offered by petitioners to the courts below. By unanimous vote of the thirteen state court judges the theory was rejected and the very authorities cited—mostly decisions of this Court—were found to support respondent's position. If the law review article is offered as an intervening circumstance "of substantial or controlling effect", it provides petitioners with cold comfort indeed. If it is not so offered, it is not relevant to this petition.

II.

Every argument in the petition for rehearing has heretofore been presented by petitioners to this Court. The old contentions are reiterated (Petition, pp. 2, 3, 6): the Parkchester regulation would be unconstitutional had it been a New York City ordinance; the decisions below are in conflict with those of this Court; Jehovah's Witnesses are not trespassers against the tenants; and apartment dwellers of the nation suffer because Jehovah's Witnesses cannot reach them.

There is nothing new here. No new cases are cited;

no new theories of law are propounded by petitioners' counsel. Petitioners complain that the "symmetry" (*id.*, p. 6) of this Court's decisions in the Jehovah's Witnesses cases has been broken by the holdings below. But that is precisely what they argued in their certiorari petition. They further assert that the denial of certiorari creates an inconsistency in this Court's decisons. But asserted inconsistency in the rulings of this Court is futile in support of an application for a rehearing (*Morgan* v. *United States*, 304 U. S. 1, 26 [1937]). Moreover, the holdings below are entirely consistent with the structure of the law pronounced by this Court in cases involving Jehovah's Witnesses.

In support of their position that the Court should accept this and the *Hall* case (No. 400) for review, petitioners declare that Jehovah's Witnesses will continue to bring up cases from other jurisdictions presenting the same questions until this Court has accepted them for review (*id.*, pp. 6, 7). That amazing declaration, made now for the first time, is more threat than argument. Few unsuccessful litigants would have the temerity to suggest that the Court must hear them now, for otherwise they intend to disregard state court rulings and persist in bringing up other cases until they are heard (cf. *id.*, pp. 6-8). In any case, surely this is not a "substantial" ground for a rehearing.

III.

The failure of petitioners' counsel to supply the certificate required by Rule 33 has made the foregoing discussion necessarily conjectural. To our knowledge, no circumstance has intervened which could have

affected the result already reached by the Court. Nor has there been a single ground of argument available to petitioners—substantial or otherwise—which was not submitted to the Court upon the original petition.

In short, petitioners' counsel would have great difficulty in conscientiously executing the required certificate. Certainly nothing in the petition for rehearing would justify its execution. Whether inadvertently or otherwise, petitioners' counsel, in omitting to furnish the certificate, ignored the rules of the Court, with the result that the rehearing petition is defective.

Conclusion.

The petition for rehearing is no more than a warmed-over summary of the earlier petition for a writ of certiorari. Its arguments, not properly before the Court upon an application of this kind, have already been answered at some length in our brief opposing that earlier petition.

After hearing all of the contentions which petitioners are now reiterating, this Court denied their application for review of this cause. Protraction of this litigation by an application which utterly fails to meet the substantial requirements of Rule 33 is unwarranted. *Interest reipublicae ut sit finis litium.*

Respectfully submitted,

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PHILIP T. SEYMOUR,
Of Counsel.